



Inexcusable Wrongs

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Inexcusable Wrongs

John C. P. Goldberg[†]

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Introduction

Like a stern parent, tort law has little patience for excuses.¹ It instructs us to refrain from attacking others even when we are provoked or under duress. It requires us to avoid trespassing on or converting others' property even out of necessity. It insists that we be careful even in the face of pressures that would induce carelessness in a cautious and resilient person. And excuses carry little or no weight when it comes to determining the compensation that tortfeasors owe their victims.

On these dimensions, criminal law is more forgiving. It recognizes nominate excuses such as duress and provocation, as well as an array of innominate excuses that temper punishment. The same is true of ordinary morality—we tend to react less sharply to wrongs attended by an explanation that renders their commission more comprehensible.² No less than criminal law and morality, tort law seems concerned with holding persons answerable for their wrongs, and excuses seem to go hand-in-hand with answerability of this sort. So why, or in what sense, are torts inexcusable wrongs?

One way to answer this question is to avoid it. If, for example, tort law is understood as a scheme to incentivize the adoption of cost-efficient precautions against injury, rather than as law that stands ready to hold wrongdoers answerable to their victims, its inattention to excuses might be unproblematic. The same could be said if tort law is seen as a mechanism for fairly allocating losses: at least as between an innocent victim and a wrongful injurer, the argument might go, fairness demands that the loss be borne by the injurer, even an injurer who has an excuse. Tort law's nonrecognition of excuses might even be cited as evidence favoring the interpretive accuracy of one of these conceptions of tort.

The aim of this Article, by contrast, is to answer the question head-on—to explain how tort law, understood as law that enables victims to hold wrongdoers answerable, cogently can refuse to recognize excuses.³ The point is not that tort law would be incoherent or grossly dysfunctional if it were to recognize certain excuses.⁴ Torts are not inexcusable in this strong sense. Rather, it is that the courts' longstanding disinclination to recognize excuses in this domain is entirely defensible.⁵

¹ JAMES GOUDKAMP, TORT LAW DEFENCES 82-83 (2013) (arguing that Anglo-American tort doctrine does not recognize excuses defeating liability, and citing other scholars who make the same claim).

² Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in AGENCY AND ANSWERABILITY 219, 239-46 (2004) (observing that excuses can mitigate the harshness with which even heinous misdeeds are judged).

³ I will suggest that contract law is like tort law in being unreceptive to excuses. *See infra* text accompany notes 130-134.

⁴ Compare Bruce Chapman, *A Theory of Criminal Law Excuses*, 1 CAN. J. L. & JURIS. 75, 86 (1988) (asserting that tort law has no conceptual space for excuses).

⁵ Duress, provocation, and other nominate excuses are defined narrowly in criminal law and probably are invoked successfully only on rare occasions. An investigation of excuses might thus seem to promise to locate only a trivial difference between tort and other departments of law. However, as noted, excuses often are the stuff of criminal sentencing, and in that sense are hardly esoteric. Regardless, this imagined objection merely expresses an *ex ante* doubt about the fruitfulness of the proposed inquiry. The proof will have to be in the pudding.

The inexcusability of torts, I will ultimately suggest, teaches us something important about what it means for law to identify conduct as wrongful. It is often supposed that talk of torts and crimes as “legal wrongs” is either vacuous (a tort or crime is a wrong only in that the law declares it so) or reflective of an excessively moralistic and judgmental understanding of what it means to commit a tort or crime. Neither of these perspectives accurately captures the sense in which torts are wrongs. They are not wrongs in name only, nor are they typically heinous misdeeds.

The title of this article thus strikes an ironic chord. The phrase “inexcusable wrongs” calls to mind acts so awful as to be unforgivable. Yet torts are often mundane, so their inexcusability cannot stem from their being beyond the pale. The absence of tort excuses instead connects to other features that mark torts as a distinctive kind of wrong. As I will explain, it is precisely because tort law is concerned to identify *relational*, *injurious* wrongs, and to enable victims of such wrongs to demand responsive conduct from those who have wrongfully injured them, that the courts are justified in defining them as inexcusable wrongs.

Part I discusses the nature of excuses, distinguishing them from other kinds of responses to allegations of wrongdoing. Part II defends the doctrinal claim that tort law does not recognize excuses, while also placing that claim in perspective. Part III argues that the distinctiveness of tort notions of wrongdoing and responsibility can satisfactorily account for why tort law, in contrast to criminal law, fails to credit excuses. It also briefly discusses excuses in contract law.

I. Excuses

In ordinary discourse, the term “excuse” and its cognates refer to any of various ways in which a person might attempt to defuse or mitigate an allegation of wrongdoing.⁶ The legal concept of an excuse, which has been developed most fully in criminal law, has a somewhat more precise meaning. To appreciate what it means for tort law to fail to recognize excuses, it is thus necessary to attend to distinctions among different kinds of response to allegations of misconduct. In particular, it is important to distinguish excuses from denials, claims of general incapacity, and justifications.⁷

A. Ways of Responding to Allegations of Wrongdoing

As its name indicates, a *denial* maintains that an actor has not committed the wrong(s) she is alleged to have committed. Suppose a defendant is charged with murder as defined by the Model Penal Code, and answers by asserting that her killing of the victim was not purposeful, knowing, or reckless. This response denies

⁶ Austin’s influential address, “A Plea for Excuses,” uses the concept of excuse in the broad sense just described. J. L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1 (1957).

⁷ This taxonomy generally follows the taxonomy developed by Paul Robinson and recently applied to tort law by James Goudkamp. See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUMBIA L. REV. 199 (1982); GOUDKAMP, *supra* note 1, at 82 n. 42 (listing various taxonomies). This list is not exhaustive. Liability or punishment can also be defeated by defenses grounded in considerations that do not pertain to the defendant’s responsibility for having done wrong—for example, a policy-based immunity defense or limitations-period defense.

having committed the charged offense.⁸ Likewise, a tort defendant who is sued for battery and who argues that he acted without any intent to touch another person denies having committed that tort.⁹ A valid denial obviates the need for any further plea: there is nothing that needs justifying or excusing given the definition of the legal wrong that one is alleged to have committed.

A claim of *general incapacity* is an effort to establish that the alleged wrongdoer is not an appropriate candidate for legal accountability. To the extent that infancy precludes punishment or liability, it constitutes a general incapacity defense.¹⁰ So, too, do certain claims of serious mental disability—for example, an assertion that a criminal defendant is so delusional as to have been unable to appreciate the nature or significance of his actions.¹¹ Although a plea of general incapacity will often contain the seeds of a denial or an excuse, it goes further in maintaining that the actor is simply not a suitable candidate for responsibility.¹²

In contrast to denials and claims of incapacity, pleas of justification and excuse assume or concede that one's conduct meets the definition of a specified wrong, and that one is eligible to be held responsible for one's wrongs. If, in response to a charge of murder, the competent, adult defendant offers a justification or excuse, she concedes having caused the death of another with the requisite *mens rea*. Yet she maintains that some further feature of the situation in which she acted warrants a less negative assessment of her action than the assessment that would apply were she to have committed the wrong without a justification or excuse.

To plead a *justification* is to claim that one's conduct was permissible, all things considered even though it meets the definition of a wrong. For example, in both tort and criminal law, the self-defense privilege permits a person to strike another as a proportionate response to an imminent threat of bodily harm posed by that other. In such a case, conduct that is in the first instance proscribed—that meets the definition of criminal assault or tortious battery—is deemed permissible once the full circumstances are taken into account.¹³

⁸ MODEL PENAL CODE § 210.2 (1962) (defining murder to require a purposeful, knowing, or reckless killing of another). Of course an accidental killing might constitute a different crime, such as negligent homicide, and an answer insisting that the victim's death was an accident would be nonresponsive, or not fully responsive, to that charge. This is just to observe that excuses, like denials and justifications, are always relative to the allegations to which they respond.

⁹ RESTATEMENT (SECOND) OF TORTS § 13 (1965) (defining battery to require an intentional or knowing touching of another).

¹⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 22 (1765-69) ("Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever."). In U.S. criminal law, the common law defense of infancy has largely been displaced by the use of juvenile courts. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. REV. 503, 512-13 (1984).

¹¹ MODEL PENAL CODE § 4.01 (1962) (defining instances in which mental disease or defect excludes criminal responsibility).

¹² GOUDKAMP, *supra* note 1, at 85 (treating pleas of insanity and infancy as standing apart from excuses).

¹³ There is a scholarly debate as to whether a justification renders the relevant conduct not only permissible but something that ought to be done. Marcia Baron, *Justifications and Excuses*, 2 OH. ST. J. CRIM. LAW 387, 396 (2005) (noting the debate). I am inclined to think that some justified conduct is merely permissible. For example, suppose Dave knows that his friend Paul is going through a very difficult time, and that he (Dave) has just given Paul

Unlike a justification, an *excuse* concedes that the actor's conduct not only meets the definition of the alleged wrong, but also that the conduct was wrongful when all things are considered.¹⁴ When a wrongdoer offers an excuse, she typically attempts to explain her misconduct as the result of her having been defeated, overcome, or misled by a certain kind of force or influence, or of having been otherwise pushed into wrongful conduct by a feature of the particular circumstances in which she acted.¹⁵ The word's Latin root, *ex-causa*, helps convey the idea.¹⁶ A person who offers an excuse points to some 'cause' that distracted her, misled her, clouded her

some advice that is very hard for Paul to accept. Dave perceives that Paul is very angry at Dave, and indeed is about to spit on him. In this situation, it might be right for Dave to endure the indignity of being spat upon by Paul, even though Dave is surely permitted to take certain steps (e.g., lightly pushing Paul) to avoid being spat upon.

In theory, one could perhaps eliminate the category of justifications (and the category of excuses) by treating each justification (and excuse) as a further specification of the underlying wrong. On this view, for example, a definition of criminal assault would take the following form: "An attempt to cause, or a purposeful, knowing, or reckless causing of, bodily injury to another, not done in the reasonable belief that the other posed a threat of imminent death or serious bodily harm to the actor or others, not done as lawfully administered punishment, not done under duress, etc..." Yet insofar as criminal and tort law aims, and ought to aim, to generate guidance rules, there is surely something to be said for defining crimes and torts by reference to relatively clean paradigm cases, without the litany of qualifications that would be required were justifications and excuses incorporated into their definitions. Moreover, as John Gardner has argued, there is probably value in having a system that defines wrongs in such a way that there is a burden on those who commit them to come forward with an account that justifies (or excuses) them. JOHN GARDNER, *OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW* 77-89 (2007).

¹⁴ GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 10.3.4, at 811 (1978) (excuses "do not constitute exceptions or modifications of the norm [of conduct that has been allegedly violated], but rather a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm"). As indicated below, I would modify Fletcher's formulation in various ways.

Because excused wrongs are still wrongs, excused wrongdoers can cogently be held accountable in ways that justified (putative) wrongdoers are not. *See* Robinson, *supra* note 7, at 278-91 (noting distinct collateral consequences in criminal law that follow from an action's being excused rather than justified, including differences in the application of rules of accomplice liability).

¹⁵ Both justified and excused conduct can generate regret, although the nature of the regret each generates is distinct. One who justifiably kills in self-defense might sincerely regret having taken a life. Likewise, a justified action might be one from which the actor seeks to distance himself. Still, in a case of justification, any regret or effort at disassociation would concern the existence of the circumstances that necessitated the justified action. In a case of excuse, there is an additional basis for regret over one's having acted less well than one ought to have acted.

¹⁶ Definition of excuse, v., Oxford English Dictionary, www.OED.com. So too does the root of the word "succumbed," which suggest the idea of a person being placed under the influence or control of some other person or force. Within a discussion of responsibility that does not attempt to isolate the distinctiveness of excuses, Bernard Williams suggested that the concept of an excused wrong can be found in ancient Greek literature. *See* Bernard WILLIAMS, *SHAME AND NECESSITY* 52-54 (1993) (discussing an episode in *The Iliad* in which Agamemnon attempts to explain his mistreatment of Achilles to Achilles as the product of divinely-imposed madness, which explanation is offered not to absolve Agamemnon but to render his wrong more understandable).

judgment, weakened her resolve, or otherwise made it too difficult for her to refrain from doing what she ought not to have done. By pointing to these sorts of impediments, an excuse renders the commission of a wrong more understandable and thereby generates a claim to leniency or forgiveness that is unavailable to actors who lack an excuse.¹⁷

B. More on Excuses

While excuses involve an explanation of wrongdoing in terms of a succumbing or failing, not just any succumbing or failing will suffice. Suppose a motorcyclist abruptly cuts in front of a car, enraging the car's driver, as a result of which the driver deliberately slams his car into the back of the motorcycle. While the car driver can point to his hair-trigger temper as an explanation for his behavior, it is not an explanation that renders his wrong understandable in the requisite sense, and hence it is not one that can serve as an excuse.¹⁸ Excuses are normative.¹⁹ An effort at an excuse will be credible only if it offers an explanation of a wrong that renders it understandable in light of norms as to how persons are supposed to handle situations in which it is more difficult than usual to do the right thing.

The norms that determine what counts as a more understandable wrong vary with context. Some are more subjective, some more objective; some are more forgiving, some strict. Criminal law famously defines its nominate excuses against

¹⁷ See FLETCHER, *supra* note 14, § 10.3.2, at 804 (determining when an excuse will lie in criminal law is “patently a matter of moral judgment about what we expect people to be able to resist in trying situations”); see also Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 26 S. CAL. L. REV. 1331, 1334 (1989) (“duress is a normative defense: the actor should be excused only if he attained or reflected society’s legitimate expectations of moral strength”); Erin Kelly, *What is an Excuse?*, in BLAME: ITS NATURE AND NORMS (D. JUSTIN COATES & NEAL A. TOGNAZZINI EDS., 2013) (“Circumstances surrounding an agent’s disregard for morality sometimes challenge the appropriateness of ordinary moral expectations by unsettling the ordinary presuppositions of our expectations. This is the case if the obstacles seem too much reasonably to require the agent to bear without experiencing inner conflict, ambivalence, indifference, or stress that might lead her morally to fail to act well.”). Focusing on criminal law, John Gardner argues that an excuse involves a claim by an actor to have had reasonable grounds for holding the beliefs or harboring the feelings that prompted his wrongful action. On his account, for example, a criminal defendant claiming provocation is claiming to have been justified in being provoked, though not justified in acting on that provocation by killing another. GARDNER, *supra* note 13, at 86, 133-34, 257-58, 269.

¹⁸ In this example, the wrongdoer’s malicious disposition toward the victim helps render any claim to an excuse particularly inapt. I do not thereby mean to endorse the distinct claim that excuses are recognized only when circumstances demonstrate that the wrongdoer’s wrong was not animated by disrespect. See Peter Westen, *An Attitudinal Theory of Excuse*, 25 LAW & PHIL. 289, 373 (2006) (arguing that excused crimes are crimes for which one cannot attribute to the criminal an attitude of disregard for the interests protected by the relevant criminal prohibition). One who commits a provoked assault might act with disdain for the protected interests of the victim, yet still may be able to claim provocation as a partial excuse.

¹⁹ Gardner, *supra* note 13, at 124. In my view, excuses are not only normative, but conduct-guiding. See *infra* text accompany notes - (critiquing the claim that excuses are not conduct-guiding).

relatively demanding and objective criteria.²⁰ A criminal assault defendant claiming duress, for example, must demonstrate that he committed the assault under a threat that would “induce ‘such a fear as a [person] of ordinary fortitude and courage might justly yield to.’”²¹ They are so defined in part because these excuses—unlike excuses recognized at sentencing—have the dramatic effect of sparing the defendant from being held accountable for the crime she has committed, and in part to limit their availability to instances in which it is especially plausible to believe that the actor succumbed in the right way. Suppose *D* kills innocent victim *V* only because third-party *T* had threatened imminent harm to *D*’s child unless *D* kills *V*. The situation in which *T* placed *D* provides *D* with a powerful explanation of why he intentionally visited harm on an innocent bystander, even though the killing was still *D*’s doing, and even supposing that *D*’s killing of *V* was wrongful.

Because excuses concern instances in which there is a complication in the linkage between one’s actions and one’s agency, the history of the circumstances being invoked as grounds for an excuse will tend to matter. If an agent can fairly be held responsible for creating those circumstances, he often will not be able to invoke them as an excuse.²² This much is evidenced in criminal law’s opposing treatment of involuntary and voluntary intoxication. If a person commits a crime because his judgment or inhibitions were impaired after he was secretly drugged by another, he may be able to claim an excuse. The same is not true if he gets himself intoxicated.²³

J. L. Austin famously suggested that excuses tend to provide only partial exoneration.²⁴ It is clear, however, that in law at least, some excuses operate to spare an actor entirely from any adverse legal consequences. For example, a successful duress argument defeats a criminal prosecution for assault. Nor is there anything conceptually or morally odd about being *fully* excused in this sense—just as there is nothing odd about a crime being pardoned.²⁵ A fully excused legal wrong

²⁰ ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY AND THE LAW* 164 (1999) (discussing the objectivity of the norms contained within excuses recognized in criminal law).

²¹ *State v. Toscano*, 378 A.2d 755, 761 (N.J. 1977) (quoting *United States v. Haskell*, 26 Fed. Cas. 207 (Pa. Cir. Ct. 1823)).

²² See generally Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985) (surveying the law’s treatment of various scenarios in which a defendant helps to create conditions that he later invokes as grounds for a defense to a criminal prosecution).

²³ See Model Penal Code § 2.08 (1962).

²⁴ Austin, *supra* note 6, at 3 (“few excuses get us out of it completely: the average excuse, in a poor situation, gets us only out of the fire into the frying pan—but still, of course, any frying pan in a fire.”).

²⁵ If, as I contend, excuses such as duress render the commission of a crime more understandable, as opposed to defeating the allegation of criminal wrongdoing, one might fairly ask why, or on what grounds, a court can enter a judgment of “not guilty” with respect to a defendant who establishes such an excuse. Shouldn’t the practice instead be to enter a judgment of “guilty” and then release the defendant without punishment? By declaring a defendant whose criminal act is excused “not guilty,” does the court arrogate for itself a power to pardon?

As to the last question, concerning judicial authority, the short answer is that legislatures, by recognizing excuses in criminal codes, have conferred the requisite authority on the courts. As to the form of judgments entered in cases of fully excused criminal conduct, it is important to remember that a judgment of “not guilty” does not necessarily entail that the defendant did not commit the alleged crime. A judgment of “not guilty by reason of

is still a wrong. It is simply a wrong for which one is not held legally answerable or accountable.²⁶

With respect to judgments about the acceptability of an actor's conduct, denials and justifications enjoy a certain priority over excuses. It is better not to commit a wrong than to commit a wrong under circumstances that render its commission understandable.²⁷ Nonetheless, it is common for alleged wrongdoers simultaneously to assert a denial, a justification and an excuse, and the same facts marshaled to support the denial or justification often will also be invoked in aid of establishing the excuse. For example, a claim that one's act was the lesser of two evils, and therefore justified, might rest on facts that also tend to demonstrate that the act was in response to a kind of compulsion that should count as duress.

To distinguish between excuses, on the one hand, and denials, claims of general incapacity, and justifications, on the other, is not to take a position on whether a particular responsive plea belongs in one category or another. In criminal law, for example, there is a longstanding debate about whether self-defense based on an actor's reasonable but mistaken belief that the victim was about to harm him should be treated as a justification or an excuse.²⁸ It is also possible that the same word—"necessity" or "duress" for instance—might, depending on the facts, refer to a justification and an excuse.²⁹ A person who intentionally kicks his victim in the shin in order to save his child from imminent death at the hands of a third-party probably has a claim not merely to the excuse of duress, but to the justification of necessity.

Finally, because a wide array of conditions might generate plausible claims of excuse, legislatures and courts obviously face choices about whether and how to recognize particular excuses.³⁰ As noted, Anglo-American criminal law seems generally inclined to recognize formally only a handful of relatively clear-cut excuse-based defenses concerning discrete conditions affecting a defendant's actions at the time of acting. It does not recognize as nominate excuses diffuse background conditions that might render certain wrongful conduct understandable. Thus, "duress" is the name for an excuse that spares a criminal wrongdoer from being held legally accountable whereas "narcotics addiction" and "severely abusive childhood" are not, even though they could conceivably count as the kinds of influence that render an actor's wrong understandable. However, when it comes to the sentencing

insanity," for example, conveys that the defendant committed the alleged offense but also that there are reasons to deem him not guilty of—that is, *not to be held responsible for*—the offense. Thanks to James Edelman and John Gardner for raising these issues and informing my thinking about them.

²⁶ This observation may be consistent with J. L. Austin's, in that a legal wrong's being fully excused does not mean that the wrong is in all respects excused. For example, a person who assaults under duress perhaps might still be subject to legitimate criticism.

²⁷ Baron, *supra* note 13, at 389 (2005).

²⁸ Kimberly Ferzan, *Justification and Excuse*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 239, 243-51 (John Deigh & David Dolinko eds., 2011).

²⁹ FLETCHER, *supra* note 14, § 10.4.1, at 818 (noting that necessity can function as a justification and an excuse); Baron, *supra* note 13, at 389 (noting that duress is usually an excuse but can be a justification).

³⁰ It goes almost without saying that different legislatures and courts at different times have reached different judgments as to when circumstances render the commission of a wrong understandable in the requisite sense.

phase of a criminal proceeding, a defendant's addiction or abusive childhood might provide a partial excuse warranting a lesser punishment.³¹ In short, law can and does recognize different kinds of excuses in different ways and to different effect.³²

C. Denials and Excuses Revisited

Although I have distinguished excuses from other kinds of responses to allegations of wrongdoing, it will aid the cause of clarity to acknowledge ways in which these categories overlap.

As was noted above, denials are always keyed to the definition of the wrong(s) being denied. Because wrongs such as crimes and torts tend to be defined to require volitional action on the part of the alleged wrongdoer, some denials will rest on a claim that the defendant's action was not volitional. In turn, these sorts of denials will sometimes invoke considerations that would support an excuse if the wrongs in question had been defined differently.

For example, suppose a criminal defendant argues that he should not be convicted of assault because his attack took place while under hypnosis. This defendant can plausibly be understood as making an excuse for his assault. Yet a criminal code might instead classify this particular responsive argument as a denial. In doing so, it would be treating an assault committed by a hypnotized actor as failing to count as the actor's doing—it would be as if a third person had picked up the hypnotized actor and thrown him into the victim. There is no need for an excuse in this situation, because excuses come into play only when a wrongful act is more robustly attributable to the actor making the excuse. Not surprisingly, the instances in which criminal and tort law recognizes excuse-like denials of this sort are instances in which the disconnect between the defendant's acts and his capacity for agency is particularly dramatic.

Standard requirements of volitional action as a condition of criminal or tort liability will in this way tend to free actors from liability for conduct that might be excused were that requirement watered down or eliminated.³³ A responsive plea that the wrongful act in question was not really the act of the defendant is a denial of wrongdoing, but it is a denial on the basis of excuse-like factors. Obviously other

³¹ Generally speaking, the punishment phase of a criminal trial calls for a consideration of all relevant information pertaining to the defendant's commission of the crime. *Williams v. New York*, 337 U.S. 241 (1949) (observing that judges are constitutionally permitted to sentence, and should sentence, on the basis of "the fullest information possible concerning the defendant's life and characteristics"). Information that might support an excuse relevant to sentencing tends to be provided to courts through presentence reports, but also can be introduced at trial or via a defendant's allocution. The instances in which, and the extent to which, a judge or jury can reduce a defendant's punishment in light of a proffered excuse depends on the type of punishment being administered and the relevant statutory and regulatory framework for punishment. Schemes of indeterminate, non-guideline sentencing, for example, will tend to give judges more leeway to credit excuses than a guidelines-based schemes, though the latter also recognize certain excuses as grounds for reducing punishment.

³² Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 26-28, 56-57 (2003) (emphasizing the normative dimension of decisions as to what should be recognized within criminal law as a justification or an excuse). Whether this pattern of recognized excuses is defensible is a question beyond the scope of this Article.

³³ GOUDKAMP, *supra* note 1, at 88.

denials—for example, a denial insisting that the defendant was not even present at the scene of an alleged assault—are not connected to excuses in this way.

Recognition of the overlap between denials and excuses is important not only to the cause of clarity, but also to avoid attributing excessive significance to the limited role that excuses play in criminal law, and to their absence in tort. Just because there are no excuses in tort does not mean that one can be held liable for injuries caused by bodily movements that are the product of physical compulsion by another. Limits on criminal and tort liability that could be fashioned as excuses are already built into the definition of crimes and torts, and hence are pleaded as denials. At the same time, it hardly follows from the availability of these excuse-like denials that the presence or absence of excuses apart from excuse-like denials is unimportant. There is still plenty of room for excuses to operate to further limit liability.

II. Does Tort Law Recognize Excuses?

In claiming that tort law does not recognize excuses, I am in good company. Jules Coleman, John Gardner, Joseph Raz, Arthur Ripstein, and Kenneth Simons has each asserted as much, though without much elaboration.³⁴ Moreover, James Goudkamp has recently offered a fulsome defense of this claim.³⁵ Still, some further elaboration is warranted. I will, of course, stand with the conventional wisdom, though I will also aim to put it in proper perspective, and will acknowledge certain qualifications.

By way of perspective, it is important to recall the concluding observation of Part I. Torts, like crimes, are defined in ways that already account for certain excusing conditions. An attack committed as a result of involuntary intoxication likely will not be deemed a battery because of the absence of anything that would count as a volitional act by the alleged tortfeasor. Lest it be read too broadly, the claim that tort law does not recognize excuses must be understood against this backdrop.

As for qualifications, I will offer two. First, I note below some instances in which tort law, in the course of defining certain torts and tort defenses, arguably allows excuses to defeat liability. These instances are nonetheless marginal, and not merely in a practical sense. They are *conceptually marginal* in that they involve invocations

³⁴ RIPSTEIN, *supra* note 20, at 138-39 (treating excuses in law as belonging exclusively to the domain of punishment); JULES L. COLEMAN, RISKS AND WRONGS 224, 259-63 (1992) (arguing that tort law does not recognize excuses that defeat culpability but does recognize excuses that defeat the attribution of an injurious act to an agent on the ground that the injury victim has no claim in justice to repair by that agent); Bruce Chapman, *A Theory of Criminal Law Excuses*, 1 CAN. J.L. & JURIS. 75, 78 (1988) (observing that mistake and “quite possibly necessity” do not operate as excuses in tort law); John Gardner, *Justification Under Authority*, 23 CANADIAN J. L. & JURISPRUDENCE 71, 92 (2010) (asserting that tort law “makes no room for excuses”); Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. LEG. STUDIES 1, 9-10 (2010) (arguing that it is a conceptual mistake to think of negligence law as granting an excuse to actors who act with due care; excuses “are not relevant to compensation”); cf. Kenneth Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 725 (2008) (noting that excuses to liability are recognized in criminal law “much more readily” than in tort). As Goudkamp notes, probably the highest-profile dissenter from the conventional wisdom is George Fletcher. GOUDKAMP, *supra* note 1, at 83, 86-88 (discussing George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 551-56 (1972)).

³⁵ GOUDKAMP, *supra* note 1, at 82-101.

of excuses to define the outer boundaries of tortious conduct rather than providing independent grounds for leniency toward actors who have committed torts. Second, I will concede that fact-finders are granted a certain leeway to take account of excuses when awarding punitive damages and when apportioning liability among tortfeasors.

Finally, it is worth acknowledging the obvious point that real-world litigation often goes beyond doctrinal bounds. Thus, even if excuses are not technically relevant to a legal issue in a tort case, a defense lawyer might well seek to introduce evidence of considerations that would support the finding of an excuse in another setting. Likewise, insofar as juries make judgments about liability and damages in a holistic manner, they probably sometimes take into account evidence of excuses, even if that evidence is not strictly relevant to the elements of the plaintiff's prima facie case or to affirmative defenses raised by the defendant. In principle, a scrupulous trial judge might exclude excuse-related evidence for lack of relevance. But insofar as judges do not, there is no formal mechanism that would exclude jurors from contemplating excuses in determining liability. This feature of tort litigation perhaps further enhances the sense in which excuses operate at the margins of tort doctrine to expand the domain of recognized denials and justifications.

A. Tort Law's Missing Nominate Excuses

Tort law does not contain counterparts to criminal law's nominate excuses. One does not find "duress" or "provocation" marked off as discrete defenses in tort treatises.³⁶ And there is no evidence that modern law in this respect departs from earlier iterations. Indeed, the available evidence cuts the other way. At the beginning of the seventeenth century, the King's Bench in *Weaver v. Ward* offered the now-famous bit of dictum that a "lunatick" could be subject to liability via a personal injury action even if he would not be eligible for criminal punishment.³⁷ Although *Weaver's* dictum seems to address a claim of general incapacity, its reasoning applies, *a fortiori*, to a claim of excuse based on mental disability. Not long after *Weaver*, in *Gilbert v. Stone*, the same court rejected an attempt by a defendant

³⁶ *Id.* at 88-89 (noting the absence of provocation and duress defenses to tort liability). See, e.g., RESTATEMENT (SECOND) OF TORTS § 73, illus. 1 (1965) (noting that one who kills another under duress is subject to liability to the estate of the victim).

The second Torts Restatement contains a chapter titled "Justification and Excuse." RESTATEMENT (SECOND) OF TORTS Ch. 45 (1979). However, the chapter mentions a grab-bag of defenses and makes no attempt to set out systematically what might count as a legally recognized excuse for the commission of a tort. A few decisions—mostly from lower courts, and mostly issued before 1970—hold that evidence of a victim's having provoked a tortfeasor's attack can be considered as grounds for reducing the victim's compensatory damage award. Andrea G. Nadel, *Provocation as Basis for Mitigation of Compensatory Damages in Action for Assault and Battery*, 35 A.L.R.4th 947 § 4 (1985); see *infra* text accompanying note 94.

³⁷ 80 E.R. 284, 284 (1616). Goudkamp reports that seventeenth century commentators, including Bacon and Hale, concurred on this point. GOUDKAMP, *supra* note 1, at 166-67. The black letter law seems not to have changed much between the seventeenth and twentieth centuries. See ARTHUR UNDERHILL, A SUMMARY OF THE LAW OF TORTS, OR WRONGS INDEPENDENT OF CONTRACT 45 (11th Ed. 1925) ("no doubt a lunatic is generally liable in tort").

sued for conversion to claim duress as an excuse.³⁸ On the issue of excuses (and incapacities), George Wilson’s 1800 edition of Matthew Hale’s *History of the Pleas of the Crown* contrasted criminal and tort law’s treatment of infancy, dementia, ignorance, necessity and “fear” on still-familiar terms:

[o]rdinarily none of these do excuse those persons, that are under them, from civil actions to have pecuniary recompense for injuries done, as *trespasses*, *batteries*, *woundings*; because such a recompense is not by way of penalty, but a satisfaction for damage done to the party: but in cases of crimes and misdemeanors, where the proceeding against them is *ad poenam*, the law in some cases, and under certain temperaments takes notice of these defects, and in respect of them relaxeth or abateth the severity of their punishment.³⁹

The difference between criminal and tort law with respect to the recognition of nominate excuses can be further illustrated by considering their respective treatments of “necessity.” However, some brush-clearing is first required because, as noted above, the term “necessity” can be used to refer both to a justification and an excuse.⁴⁰ *Qua* justification, “necessity” usually is an invocation of the “lesser evils” defense, although it may also refer to an expanded notion of self-defense. *Qua* excuse, “necessity” is akin to duress, but points to background conditions rather than wrongful actions by third parties as the influence to which an actor has succumbed.

The criminal law chestnut of *Dudley and Stephens*—in which sailors adrift at sea with no apparent hope of rescue killed and cannibalized their shipmate—illustrates the two sides of the concept of necessity, although the defendants ultimately failed in their efforts to benefit from either.⁴¹ The court first construed the defendants’ plea of necessity as a justification, implicitly declining to apply the choice-of-evils defense, and explicitly rejecting the idea that self-defense could extend to the killing of a person who posed no threat to the killers.⁴² The court then entertained the argument that necessity excused the killing—that the defendants’ desperate situation was a ground for treating them less harshly. The court rejected this argument too. Rather than assessing the defendants’ actions against the standard of an ordinarily resilient person, who might well have succumbed in such a dire situation,⁴³ the court applied the standard of a person of *extraordinary* resolve, exemplified by the soldier who is fully prepared to heed his “duty of dying for

³⁸ *But see* Waller v. Parker, 45 Tenn. 476 (1868) (recognizing a duress defense to a tort claim).

³⁹ 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 15 (George Wilson ed., 1800) (1736).

⁴⁰ *See supra* note 29 and accompanying text.

⁴¹ Regina v. Dudley, 14 Q.B.D. 273 (1884).

⁴² The court approvingly invoked Hale for the proposition that the prospect of imminent starvation does not justify theft of property, much less the intentional killing of another. *Id.* at 283.

⁴³ *Id.* at 287 (“It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards that we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”).

others.”⁴⁴ In so reasoning, the court essentially concluded that, no matter how trying the circumstances, a murder cannot be excused.

In contrast to the defendants in *Dudley*, those criminally prosecuted for lesser crimes can occasionally benefit from necessity, primarily in the form of the lesser evils justification. For example, a prisoner who escapes to avoid being injured by a prison fire, or to avoid otherwise unavoidable sexual abuse, may be able to claim necessity as a justification for the escape.⁴⁵ Likewise, in criminal law, certain thefts might be deemed justified if necessary to prevent imminent harm, such as starvation.⁴⁶ In some situations, necessity does not justify a crime, nor fully excuse it, but can provide a ground for leniency in punishment.⁴⁷

In tort law, the concept of necessity is most famously associated with *Vincent v. Lake Erie Transportation Co.*⁴⁸ The defendant’s ship was scheduled to depart from the plaintiff’s dock when a powerful storm arose. To avoid losing the ship, the captain kept it at the dock without the consent of the dock owner. The storm battered the ship against the dock, causing damage for which the dock owner sought compensation. The ship’s owner argued against liability on the ground that the captain’s “conduct during the storm was rendered *necessary* by prudence and good seamanship under conditions over which [he] had no control....”⁴⁹ A divided Minnesota Supreme Court upheld a judgment for the plaintiff dock owner.

Vincent has come to stand for the idea that tort law recognizes a partial affirmative defense to trespass known as the incomplete privilege of private necessity.⁵⁰ The privilege, on this reading of the case, is found in the majority’s

⁴⁴ *Id.* A tort analogue to this holding is the rule that imposes liability on an actor who intentionally uses another person as a shield to ward off a third-party’s attack. RESTATEMENT (SECOND) OF TORTS § 73, illus. 2 (1965).

⁴⁵ See, e.g., *State v. Ottwell*, 784 P.2d 402, 404 (1989) (discussing cases recognizing necessity as a justification for escape).

⁴⁶ Model Penal Code, Comment to §3.02, at 9-14 (1985) (explaining that the Code’s choice-of-evils defense was intended to encompass a case in which mountain climbers lost in a storm appropriate provisions from another’s cabin in order to survive); see also *State v. Rasmussen*, 524 N.W.2d 843 (N.D. 1994) (defendant, a passenger in a car unexpectedly abandoned by its driver in a deadly storm, was justified in committing the crime of driving without a license to avoid serious injury that could have resulted from remaining in the car or abandoning it).

⁴⁷ *Long v. Commonwealth*, 478 S.E.2d 324, 327 (Va. App. 1996) (necessity can be factored into sentencing of the defendant as a habitual offender).

⁴⁸ 124 N.W. 221 (Minn. 1910). For an opinionated survey of the literature on *Vincent*, see Stephen D. Sugarman, *The “Necessity” Defense And The Failure Of Tort Theory: The Case Against Strict Liability For Damages Caused While Exercising Self-Help In An Emergency*, 5 ISSUES IN LEGAL SCHOLARSHIP (2005), <http://www.degruyter.com/view/j/ils.2005.5.issue-2/ils.2005.5.2.1063/ils.2005.5.2.1063.xml?format=INT>.

⁴⁹ 124 N.W., at 221 (emphasis added).

⁵⁰ RESTATEMENT (SECOND) OF TORTS § 196 (1965). Certain cases of so-called “public necessity,” by contrast, may provide the defendant with a justification that defeats liability. For example, the 1608 decision in *Mouse’s Case* arguably holds that property may be intentionally destroyed if necessary to save lives in response to a life-threatening emergency, the existence of which is not anyone’s fault. 77 Eng. Rep. 1341, 1342 (K.B. 1608). Whether public necessity justifies a trespass outside of the emergency context is a question that exceeds the scope of the current project. For a brief argument that English tort law is consonant with prevailing law in the U.S. on the issue of necessity in trespass, see John C. P.

implicit endorsement of a prior Vermont decision, *Ploof v. Putnam*.⁵¹ In *Ploof* a family docked their boat at the defendant's dock during a storm. However, the defendant's employee, pursuant to his employer's instructions, cast off the boat, as a result of which the family members and their boat were harmed.⁵² The defendant's attempt to dismiss the family's ensuing suit on the pleadings was rejected by the Vermont Supreme Court, which reasoned that a jury might find the mooring of the boat was necessary under the circumstances.⁵³ Private necessity, *Ploof* thus seemed to say, grants a trespasser a privilege against having a property owner exercise the right to exclude others. However, according to *Vincent*, this privilege is "incomplete" because there still must be payment for any damage caused by remaining on the property without permission. The standard reading of *Vincent* thus carries at least a suggestion that necessity operates as an excuse for the tort of trespass to land. On this reading, a trespasser is 'forgiven' his trespass to the extent of not being subject to expulsion, yet is not completely forgiven and hence must pay damages.

The problems with this reading are twofold. First, insofar as the court treats necessity as counting in favor of the boat owner, it does so on terms suggesting that necessity is functioning as a denial or justification rather than an excuse. The court nowhere suggests that the emergency facing the ship generated a reason to grant the ship's owner some sort of leniency with respect to the terms on which it would be held accountable for its trespass. Rather, the court seems to commend the ship captain's conduct as reasonable, all things considered.⁵⁴

Second, and more fundamentally, the "incomplete privilege" idea makes a hash of *Vincent*'s reasoning.⁵⁵ The court did not conclude that the boat captain's trespass was partially privileged. Rather, it concluded that this was an entirely unprivileged trespass—a trespass plain and simple. To be sure, the captain had acted prudently, and his prudence would thus have defeated a claim by the dock owner alleging negligence causing property damage. But the tort of trespass to land is not the tort of negligence: lack of prudence is no part of the definition of trespass. If the boat, while at sea, had been thrown against the dock by the storm despite the captain's prudent seamanship, there would be no liability for negligence (no lack of prudence) or trespass (no intentional touching of the dock). "But here those in charge of the vessel *deliberately and by their direct efforts* held her in such a position that damage to the dock resulted...."⁵⁶ By choosing to keep the boat at the dock after permission had expired, the captain did all that was needed to be done to commit a trespass. That it was a wise choice is irrelevant to the question of whether the plaintiff could make out a *prima facie* case of trespass.

Goldberg, *Tort Law's Missing Excuses*, in TORT LAW DEFENSES ____ (Andrew Dyson, James Goudkamp & Frederick Wilmot-Smith eds., forthcoming 2014).

⁵¹ 71 A. 188 (Vt. 1908).

⁵² *Id.* at 188-89.

⁵³ *Id.* at 189.

⁵⁴ Because the trespass was reasonable, it was by definition neither malicious nor wanton and hence could not generate an award of punitive damages. *Vincent* in this sense treated necessity as the grounds for a partial denial. See *infra* text accompanying notes 88-89.

⁵⁵ This reading of *Vincent* is articulated in JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITY AND REDRESS 823-30 (3d ed. 2012). It was first suggested to me in outline by Ben Zipursky.

⁵⁶ 124 N.W., at 222 (emphasis added).

Nor, according to the court, does prudence count as an affirmative defense to trespass. However reasonable, the trespass was neither justified nor excused. To commend the captain's decision to keep the boat at the dock was not to conclude that the dock owner lacks grounds for complaining that the captain's decision unlawfully came at his expense: "having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted."⁵⁷

What about the *Vincent* court's implicit suggestion that the ship owner was entitled to remain at the dock during the storm without the dock owner's permission? Can this aspect of *Vincent* be explained without recognizing an excuse for the ship owner? In fact, the ship's entitlement to stay at the dock was not grounded in any privilege enjoyed by the ship owner. Rather, it was an application of the rule limiting a possessor of land to the use of "reasonable" self-help measures to enforce his right to exclude.⁵⁸ In other words, it was not the prudence of the ship's captain that grounded a privilege to remain. It was instead the *imprudence* of any decision to cast off the ship that denied the dock owner the authority to do so.

In sum, *Vincent* did not involve a denial, a justification, or an excuse. The court simply determined that the ship's captain had (for good reason) committed a trespass, and hence should be held liable in the usual way. One might object to this reading that it interprets trespass law as sending an odd or inappropriate message to persons, like the ship captain, facing emergency situations.⁵⁹ For, even though, in this sort of situation, prudence counsels that the captain keep the ship at the dock, the law of trespass, on the reading offered here, directs the captain to leave the dock.

However, to note this feature of trespass law is merely to observe that the scheme of rights and duties recognized in private law sometimes directs actors to refrain from conduct that is ultimately warranted as a matter of morality. Suppose Darla has contracted to sell a unique good to Pat, but then, just prior to the time of delivery, Darla discovers that selling or giving the good to Terry is the only way to save Terry's life (whereas the sale to Pat will bring only enjoyment to Pat). Darla presumably should sell or give the good to Terry even if this amounts to a breach of contract, and hence a legal wrong as to Pat. Likewise, *Vincent* tells us that it is a legal wrong to the property owner to remain on the owner's property without permission, *not* that it is in all respects wrong to do so. It thus confronts the captain with the choice of whether to act in a way that, while commendable given the larger interests at stake, is still a tort.

One other apparent counterexample to the claim that tort law does not recognize nominate excuses—a seemingly blatant one—is the recognition of "excuses" within the doctrine of negligence per se. According to that doctrine, an actor's violation of a statutory standard of safe conduct can suffice to establish that the actor failed to act with ordinary care. Yet courts recognize certain "excuses" that, where applicable, deny statutory violations this effect. The "excuse" label notwithstanding, the overwhelming majority of these grounds consist of justifications.

The ameliorative considerations recognized by courts in applying the doctrine of negligence per se are a response to the fact that statutory and regulatory

⁵⁷ *Id.*

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 77 (1965) (outlining the privilege to use reasonable force to prevent or terminate another's intrusion upon one's land).

⁵⁹ Thanks to Stephen Smith for raising this objection.

requirements tend to be stated on strict terms. For example, a statute requiring drivers to use headlights when driving after dark will tend to be written with unqualified language suggesting that a driver can be deemed careless even if her headlights fail suddenly and unexpectedly despite her prudent maintenance of the car, and despite her having had no opportunity to remedy the problem or safely cease driving before an accident is caused by the absence of headlights. Even extraordinary care, in other words, cannot constitute a *denial* of wrongdoing, given the hell-or-high-water terms of this sort of requirement. Instead, the courts treat an actor's reasons for violating the statute as sometimes sufficing to establish a justification. Thus, a violation is deemed 'excused' (i.e., justified) if it occurs despite the violator having made all reasonable efforts to comply with the statute.⁶⁰ Likewise, a violation will not support a negligence per se finding when "the actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than would noncompliance."⁶¹

Although 'excuses' for statutory violations are thus usually justifications, they are defined broadly enough to encompass certain genuine excuses. For example, if noncompliance with a statutory safety requirement results from an actor's reasonable mistake as to the requirement (or as to the applicability of the statute), it is possible that the violation is best understood as excused rather than justified. Likewise if a negligence faced circumstances that gave her no opportunity at all to avoid violating the applicable statute—for example, a case in which a car's brakes suddenly fail without warning, causing the driver, seconds after the failure, to run a stop sign and thereby strike a pedestrian who is lawfully crossing the road. Even in such a case, however, the excuse serves only to defeat the effort to use the statutory violation to prove carelessness. In other words, even if 'excuses' to negligence per se include genuine excuses, these are not excuses *for torts*. Instead they block a particular gambit within tort litigation. A defendant who successfully counters a negligence per se argument by invoking an excuse still faces the prospect of being held liable for carelessly injuring another. Indeed, even if the statutory violation is excused, the fact of the violation can still be introduced by the plaintiff as *evidence* of the defendant's carelessness. The violation's being excused merely prevents it from definitively resolving the question of whether the defendant acted carelessly.

⁶⁰ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15(b) (2010); *Busby v. Quail Creek Golf & Country Club*, 885 P.2d 1326 (Okla. 1994) (defendant club's unlawful serving of alcohol to minors held not to be a basis for negligence per se because the club made reasonable efforts to determine that the minors were of drinking age before serving them). Dobbs argues that "excuses" for negligence per se are overwhelmingly recognitions that the defendant is required by negligence to exercise ordinary care, and is not properly subject to strict liability. DAN B. DOBBS, *THE LAW OF TORTS* §141, at 330 (2001).

⁶¹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §15(e) (2010). In the well-known case of *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939), the plaintiff was walking along the side of a busy road with her back to traffic, in violation of a statute requiring pedestrians to walk against traffic. The defendant, who ran into the plaintiff, invoked the plaintiff's statutory violation as grounds for establishing per se contributory negligence. The court rejected this argument, finding that, because of construction at the site of the accident, the plaintiff had in fact chosen the safer course of conduct by walking with traffic.

B. Excuses and Compensatory Damages

To note the absence of nominate excuses in tort law is already to observe a significant departure from criminal law. However, it does not preclude the possibility that excuses enjoy informal recognition in tort, as they often do in criminal sentencing. In the U.S., for tort cases in which the plaintiff wins a verdict, a jury typically will exercise broad discretion in determining the amount of compensatory damages to award the plaintiff. One might thus fairly ask whether the damages phase of a tort trial is comparable to the sentencing phase of criminal trials in allowing for consideration of partial excuses. It is not.⁶²

Standard instructions inform jurors that their task in setting damages is to provide an amount that will fairly, reasonably, or adequately compensate the plaintiff for his tort-related injuries or losses, past and future.⁶³ The primary focus is on the tort's impact on the victim rather than the wrongfulness of the defendant's conduct. In considering the plaintiff's out-of-pocket costs, lost earnings, pain and suffering, and lost enjoyment of life, there is little occasion to contemplate possible excuses.

Excuses might sometimes play a modest role in this context. This is in part because the idea of being adequately compensated for an injury contains an ambiguity. While the term "injury" is commonly understood to refer to the consequences of suffering a wrong, it can also be understood to refer to the wrong itself.⁶⁴ Tort plaintiffs are probably entitled to be compensated (and may sometimes be compensated) for the very fact of having been wronged, apart from the further consequences of the wrong. One can make the same point in the language of damages. It will sometimes be plausible for a fact-finder to calibrate the plaintiff's "suffering" to the gravity of the tort committed against her. For example, a person whose only tort-related injury is a broken leg might be entitled to recover more by way of compensation for her suffering if the physical harm resulted from an intentional beating, as opposed to mere carelessness. By implication, a defendant's proffering of an excuse for his tortious wrongdoing could conceivably count in favor of lower compensation, on the theory that less suffering attends or ought to attend harm that results from a lesser wrong.

⁶² The focus in this section is on compensatory damages. As noted above and discussed below, excuses can play a role in the apportionment of damages and the award of punitive damages. Likewise, excuses might be relevant to a court's decision on whether to grant a request for injunctive relief in a case of nuisance or continuing trespass.

⁶³ See, e.g., *Clemente v. State*, 707 P.2d 818, 828 (Cal. 1985) (in general, a tort victim is entitled to "adequate" compensation for the harm resulting from the tort); *Mangione v. Giordano*, 2013 WL 3958280 (Conn. Super. 2013) ("The rule of damages [in a negligence case] is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for all losses, past and future, which are proximately caused by the defendant's proven negligence.") (citation omitted); *Buhring v. Tavoletti*, 905 N.E.2d 1059 (Ind. App. 2009) ("In general, [a] person injured by the negligence of another is entitled to reasonable compensation.") (quoting *Berman v. Cannon*, 878 N.E.2d 836, 841 (Ind. Ct. App. 2007), *trans. denied*); N.Y. P.J.I.—Civil 2:277 (successful negligence plaintiff entitled to recover money that will "justly and fairly compensate" plaintiff for all losses resulting from injuries sustained).

⁶⁴ John C. P. Goldberg, *Two Conceptions of Tort Damages*, 55 DEPAUL L. REV. 435, 439 (2006).

These caveats notwithstanding, the effect of excuses on compensatory damage awards is likely minimal. The compensatory damages phase of tort litigation focuses on the victim, not the wrongdoer. Certainly there is nothing in the process of awarding damages that even resembles a sentencing hearing based on a presentence report identifying facts and circumstances that render the defendant's crime more understandable and more forgivable.

C. Excuses at the Margin of Denials and Justifications

When excuses figure in substantive tort law they are invoked at the margins, to fill out the definitions of particular torts or particular justifications. In short, courts occasionally shrink the description of certain torts, or stretch the definition of certain justifications, to cover special cases in which an actor's conduct is perhaps most accurately described as tortious-but-excused. But they do so to ensure that tort law fully credits certain denials and justifications rather than out of an inclination to recognize excuses in their own right.

1. Negligence: Sudden Emergencies. Negligence is much more central to modern tort law than criminal law. Criminal law thus has far fewer occasions to consider excuses in connection with negligence. Moreover, as we will see, the misconduct at the core of negligence—the failure to take due care—is of a sort that sometimes seems to collapse the space between denials and excuses. Still, there is little evidence that negligence law leaves a significant role for excuses.

The breach element of negligence is determined by application of the ordinary care standard. That standard is notoriously insensitive even to pleas of general incapacity. This was, in effect, the message of *Weaver v. Ward* (mentioned above), and it is a clear implication of the foundational English decision of *Vaughan v. Menlove*.⁶⁵

Vaughan in the first instance concerned an effort at denial rather than an excuse. Having accidentally started a fire that spread to his neighbor's property, Menlove argued that he had done his best to be prudent and thereby fully discharged the duty of care set by negligence law. The court flatly rejected this argument, reasoning that negligence is to be adjudged by an 'objective' standard. Hence Menlove's attempted denial failed. In holding that a plea of doing one's best fails to defeat a claim of negligence, *Vaughan* further entails that a failure of prudence that is attributable to a defect in one's judgment or motor skills, even if an entirely understandable failure, does not excuse carelessness.

The objectivity of the standard of care thus ensures that liability will attach in many cases in which an actor can plausibly claim an excuse. Suppose an inexperienced driver panics while driving at night in a heavy rainstorm, even though other drivers around him are adequately managing the difficult conditions. In his panic, the driver swerves out of his lane and into another car. The driver is subject to liability for negligence: his inexperience is irrelevant. The same goes for a pharmacist who, only because he is distraught over the recent death of a family member, misfills a prescription and accidentally poisons a customer. Or imagine a person who ends up being trapped in a small, dark storeroom. Despite not being in immediate physical danger, and despite being reassured that help is on the way, he is overcome by claustrophobia and shatters a window in an effort to escape. Under

⁶⁵ 132 E.R. 490 (C.P. 1837).

the objective standard, he can be deemed to have carelessly caused injury to a passerby who is cut by the flying glass.

Negligence law demands a certain level of competence in the performance of one's actions, and is largely indifferent even to seemingly impressive explanations of why a given actor on a given occasion acted incompetently. In this respect, tort law perhaps stands in partial contrast to criminal law. To the extent that "criminal negligence" involves greater culpability than the sort of "simple negligence" that can give rise to tort liability, the difference may in part reflect criminal law's greater receptivity to at least some excuse-like considerations.⁶⁶

One facet of negligence law—the "sudden emergency doctrine"—might seem to invite consideration of excuses. According to that doctrine, one who is alleged to have acted carelessly is entitled to point to the fact that he was facing an unexpected emergency as a ground for avoiding liability. In doing so, however, the actor does not claim an excuse for her carelessness. Rather she denies having been careless. A driver who hits another car after swerving to avoid a large object that without warning falls in front of her car can argue to the jury that, even in swerving, she drove with all the competence that was required of her. "The emergency doctrine does not excuse fault; it defines the conduct to be expected of a prudent person in an emergency situation."⁶⁷ It is "an application of the reasonable person standard, with the emergency as one of the circumstances to be considered in forming a judgment about the actor's fault."⁶⁸

It is possible that certain elaborations of the sudden emergency doctrine treat it as a denial-excuse hybrid. In such cases, however, the courts treat excused carelessness as if there had been no carelessness at all. This description perhaps fits *Cordas v. Peerless Transportation Co.*,⁶⁹ famously cited by George Fletcher in support of the claim that tort law generally recognizes excuses.⁷⁰ In *Cordas*, a robber seeking to make his escape jumped onto the sideboard of a taxi and, at gun point, ordered the driver to drive off.⁷¹ The driver at first complied but then jammed on the brakes and bailed out of the car.⁷² The driverless vehicle then mounted a nearby sidewalk, causing minor injuries to the plaintiff and her children.⁷³ In dismissing their claim against the cab driver, the trial judge held that driver was not careless

⁶⁶ Thanks to Carol Steiker for this suggestion. Wayne LaFave reports that, when courts have sought to isolate the difference between criminal and civil negligence, they have tended to associate the former with riskier conduct, with the defendant's subjective knowledge of the risks posed by his conduct, or a combination of the two. WAYNE R. LAFAVE, CRIMINAL LAW §5.4(b), at 265-67 (4th ed. 2003). One can imagine some instances in which considerations that would count as an excuse for negligence—for example, the defendant's understandable ignorance of the riskiness of his conduct—would also cut against finding that one of these aggravating conditions was present. *But see* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 275-78 (1987) (arguing that judgments about criminal negligence should be no less insensitive to excuses based on a defendant's infirmities than judgments about tortious negligence).

⁶⁷ *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004).

⁶⁸ DOBBS, *supra* note 60, § 141, at 330.

⁶⁹ 27 N.Y.S.2d 198 (N.Y. City Ct. 1941).

⁷⁰ Fletcher, *supra* note 34, at 552.

⁷¹ 27 N.Y.S.2d at 199.

⁷² *Id.*

⁷³ *Id.* at 200.

under the circumstances.⁷⁴ However, in doing so the judge also invoked language suggesting that the conduct should not be deemed careless *because* it was excused, emphasizing that the situation was one that would “darken the intellect and palsy the will” of an ordinarily constituted person.⁷⁵

Consider also Section 296 of the Second Restatement of Torts. Its black-letter provisions unequivocally treat the sudden emergency doctrine as bearing on whether an actor’s action was objectively prudent.⁷⁶ Yet commentary to the section speaks in terms of an actor being “excused for an error of judgment in a sudden emergency.”⁷⁷ Likewise, some courts hold that the doctrine “excuses an unfortunate human choice of action that would be subject to criticism as negligent were it not that the party was suddenly faced with a situation which gave him no time to reflect upon which choice was best.”⁷⁸ In sum, negligence law may sometimes blur denials and excuses in sudden emergency situations, such that cases presenting a close question as to whether an actor has met the standard of care might be resolved in favor of the actor, even though the better description of the actor’s conduct is that it lacked ordinary care yet should be excused.

What goes for the sudden emergency defense also goes for judicial recognitions of “temporary insanity” as a basis for avoiding negligence liability. Indeed, the courts here seem more consistently concerned with fleshing out the ordinary care standard rather than recognizing an excuse-based defense. If one has no reason to foresee that one is about to suffer a delusion, they reason, one is not careless to engage in conduct that would become dangerous if one were to suffer a delusion while engaging in it. This is why they analogize temporary insanity to the unforeseeable onset of a disabling physical condition such as a seizure. In all of these cases, the courts break down the defendant’s denial of wrongdoing into two steps. First, they treat the actions undertaken in the grips of the delusion or seizure as not attributable to the actor—as not his doing. Second, the courts widen the frame of reference to ask whether the person was unreasonable to engage in the conduct during which the delusion or seizure occurred. Absent reason to foresee that such an event would occur, the actor is deemed not to have been careless at this earlier stage.⁷⁹ On this ‘conjunctive’ account—no fault in the background conduct attributable to the defendant, conjoined with no attribution to the defendant of immediately faulty conduct—there is no wrong committed by the defendant and hence no need for an excuse.

⁷⁴ *Id.* at 202 (“The chauffeur—the ordinary man in this case—acted in a split second in a most harrowing experience. To call him negligent would be to brand him coward; the court does not so”).

⁷⁵ *Id.* at 201.

⁷⁶ RESTATEMENT (SECOND) OF TORTS § 296(1) (1965) (“the fact that the actor is confronted with a sudden emergency ... is a factor in determining the reasonable character of his choice of action”).

⁷⁷ *Id.*, cmt. c.

⁷⁸ *Brown v. Spokane County Fire Prot. Dist. No. 1*, 668 P.2d 571, 577 (Wash. 1983) (quoting *Zook v. Baier*, 514 P.2d 923, 929 (Wash. App. 1973)).

⁷⁹ This is my effort to make sense of statements found in the Second Restatement and elsewhere suggesting that the conduct of an actor who, without forewarning, experiences transitory delirium (or a heart attack) is to be judged by reference to the imagined behavior of the reasonable delirious person (or the reasonable heart attack victim). See RESTATEMENT (SECOND) OF TORTS § 283C (1965).

2. *Battery: Reasonably Mistaken Self-Defense.* As Goudkamp observes, a plausible candidate for a recognized excuse in tort is the special case of self-defense in which the defendant acts under the reasonable but mistaken belief that the plaintiff was a threat to him.⁸⁰ A well-known example is *Courvoisier v. Raymond*.⁸¹

Courvoisier chased two nighttime intruders out of his home with a gun. Once outside, the intruders and some associates continued to menace Courvoisier, who fired at them. Raymond, a police officer, heard the shots and responded. As Raymond approached Courvoisier, Courvoisier shot Raymond. Raymond later claimed he had identified himself as an officer. However, Courvoisier claimed that he did not hear Raymond identify himself, that he saw Raymond reach toward his hip (presumably for a gun), and that, under the circumstances, he (Courvoisier) was therefore reasonable to believe that Raymond was about to attack him.

A jury found for Raymond on his tort claim against Courvoisier but the judgment was reversed. Under the trial judge's instruction, the jury could find for Courvoisier only if it concluded that Raymond was actually attacking Courvoisier, which he was not. According to the Colorado Supreme Court, this instruction was erroneous, because it "excluded from the jury a full consideration of the *justification* claimed by the defendant."⁸² The shooting would be justified if the jury believed Courvoisier's account, and if it determined that his mistaking of Raymond's actions as an attack was "excusable" because reasonable under the circumstances.

Self-defense is typically understood as a justification, and, as indicated, *Courvoisier* frames the issue on those terms. Still, the court also used the word "excusable," which reflects the fact that this variant of self-defense has an excuse-like quality. The defendant concedes that he did not, in the end, have good reason to use force against the plaintiff. His defense is that the circumstances were such that they not only caused him to misperceive the situation, but that they would similarly have misled a person of ordinary capacities.

The debate over whether self-defense based on a reasonable mistake is properly characterized as a justification or an excuse turns in part on questions of how reasons must figure in conduct in order to render conduct justifiable.⁸³ However, one need not resolve these philosophical debates in order to conclude that, in tort, reasonably mistaken self-defense rarely, if ever, functions as an excuse.

Some cases of reasonable mistake lend themselves more readily to treatment as justified rather than excused. When the defendant's mistake consists of misinterpreting actions by the victim that portend an imminent attack—as was perhaps the case in *Courvoisier*—the defendant would seem to have a strong claim to justification. True, the victim does not mean for his actions to be threatening, but arguably they constitute a threat nonetheless. Indeed, one can argue that, so far as the law is concerned, a threat (in this context) *just is* an action of a sort that, under the circumstances, is likely to induce apprehension of imminent bodily harm in a person of ordinary resilience.⁸⁴

⁸⁰ GOUDKAMP, *supra* note 1, at 90.

⁸¹ 47 P. 284 (Colo. 1896).

⁸² *Id.* at 286 (emphasis added).

⁸³ GOUDKAMP, *supra* note 1, at 91-97.

⁸⁴ Benjamin C. Zipursky, *Self Defense, Domination and the Social Contract*, 57 U. PITT. L. REV. 579, 603-05 (1996).

By contrast, suppose that Devon knows that his long-time nemesis Nemo is looking to harm him. Walking down the street one night, Devon turns a corner only to encounter a pedestrian who closely resembles Nemo. The pedestrian stares intently at Devon because he is trying to determine if Devon is the person whom the pedestrian was planning to meet. Even if it would be reasonable for Devon to mistake the pedestrian for Nemo, and even if Devon in fact mistakes the pedestrian's stare as portending an attack, Devon cannot point to any act by the pedestrian as constituting a threat in the requisite sense. Arguably, then, any use of force by Devon against the pedestrian in the mistaken belief that the pedestrian was Nemo is at most excused, not justified.⁸⁵

Courts probably have not defined the self-defense privilege with the sort of precision that would answer clearly whether, or on what grounds, they would apply the privilege in a case such as Devon's.⁸⁶ For its part, the Second Restatement of Torts rather scrupulously avoids taking a position, and more generally avoids giving a precise definition of the scope of the reasonably mistaken self-defense privilege. That it does so is consistent with my assertion that the courts seem inclined to leave some wiggle room at the borderline of justification and excuse. The point of this studied ambiguity is not to ensure the availability to defendants of mistaken self-defense as an excuse. Rather, it is to ensure that the self-defense privilege extends to cover all cases of genuinely justified self-defense. Excused self-defense in this way operates at the margins of justified self-defense.⁸⁷

In both tort law and criminal law, self-defense is paradigmatically a justification. The defendant argues that her use of force against another was permissible because the force was used to ward off a certain kind of danger. When courts consider when and how to recognize self-defense in cases of reasonable mistake, they are attempting to determine the breadth of this justification. Indeed, this is exactly how the issue is framed in *Courvoisier*—whether the defendant's mistake was “excusable” so as to give him a “justification” for shooting Raymond. Even if some

⁸⁵ *Id.* at 603 (offering a similar example).

⁸⁶ Sections 63 and 65 define the privilege of self-defense in terms of defending oneself against bodily harm that the defendant “reasonably believes that another is about to inflict intentionally upon him.” RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965). This language leaves room for a relatively broad version of the privilege. A comment to Section 63 further allows that “[t]he acts or statements of third persons may give to the other's conduct so threatening an appearance as to make it capable of causing such an apprehension, though standing by itself, the conduct would not be capable of so doing.” *Id.* § 63, cmt. i. The Restatement's self-defense provisions also contrast with its provisions on mistakes as to consent. In the latter, the Restatement makes clear that a defendant's reasonable mistake as to plaintiff's consent will only operate as a privilege if the mistake was based on something the plaintiff did (or failed to do in a situation in which doing something would be expected). *Id.* § 892, cmt c. This contrast again suggests that the Restatement supports the broader approach to mistaken self-defense. (On the other hand, all of the illustrations of legitimate invocations of self-defense involve mistakes arising from the victim's actions.) For the thought that criminal law may have reason to not distinguish sharply between justifications and excuses, see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUMBIA L. REV. 1897, 1898 (1984).

⁸⁷ *Cf.* JEREMY HORDER, EXCUSING CRIME 56 (2004) (analyzing cases of self-defense involving excessive force as instances in which the justification of self-defense extends to cover conduct that is properly treated as excused).

judicially recognized instances of mistaken self-defense are ultimately best understood as excused rather than justified, the context in which courts have recognized this privilege indicate that the courts are treating such conduct as *if it were justified*. Cases of mistaken self-defense, they seem to suppose, are sufficiently close to being justified that they are deemed justified, if only to err on the side of vindicating pleas of genuinely justified self-defense.

D. Where Excuses Come Into Play: Punitive Damages and Apportionment

For the sake of completeness, it is worth noting that excuses—or excuse-like considerations—sometimes figure in the law of remedies as it applies to tort cases. Specifically, they can factor into determinations as to the size of punitive damage awards, as well as the apportionment of liability between victim and tortfeasor, or between or among co-tortfeasors. As explained below, to recognize that they operate in these parts of tort law is not to make a significant concession with respect to the Article’s doctrinal claim about the lack of excuses in tort.

Punitive damages, of course, constitute an extraordinary remedy that victims of certain ‘aggravated’ torts can request. Juries are instructed to determine whether the defendant is eligible for punitive damages by virtue of having not merely committed the alleged tort, but further by having acted maliciously, wantonly, or with reckless disregard for the rights of others.⁸⁸ Insofar as tort defendants point to extenuating circumstances as a means of establishing that their conduct was not wrongful in any of these ways, they are probably best understood as asserting partial *denials* rather than excuses for having committed a wrong.

Here it will be helpful to return to *Vincent v. Lake Erie*. Recall that, in that case, the boat owner’s invocation of necessity, among other things, defeated any suggestion that the trespass against the dock owner was malicious, wanton or reckless. Necessity thus operated as a partial denial: that is, a denial that the boat captain committed the sort of ‘aggravated’ trespass that might render the boat owner vulnerable to an award of punitive damages. The point is not that necessity rendered the wrong sufficiently understandable as to be beyond punishment, but rather that it rendered the trespass not the sort of wrong for which punishment is permitted.

In contrast to its eligibility determination, the fact-finder’s setting of the size of a punitive damages award probably does leave room for excuses. Jurors are typically instructed to consider the “nature and reprehensibility” of the defendant’s conduct, including the extent to which it was consciously undertaken and systematic or continuous. One can imagine that certain excusing conditions might serve to establish, for example, that a given actor’s reckless conduct was more understandable, and therefore warrants a lower award than other forms of reckless conduct.⁸⁹

It is not particularly surprising that tort law allows consideration of excuses when turning from the question of liability for wrongdoing to the question of appropriate punitive awards for wrongdoing. In such a case, the defendant is not permitted to make an excuse for his tort, nor to invoke an excuse to limit liability for compensatory damages. Rather, the excuse serves as a consideration that a fact-finder can take into account in determining the extent to which the plaintiff may

⁸⁸ See, e.g., Col. Jury Instr., Civ. 5:4; Ill. P.J.I.—Civ. 35.01; N.Y. P.J.I.—Civ. 2:278.

⁸⁹ GOUDKAMP, *supra* note 1, at 88 (citing English cases).

extract additional funds from the defendant by way of a punitive response to the tort. When accountability takes the particular form of punishment, it is appropriate to grant the defendant additional procedural and substantive protections, including the opportunity to make excuses.⁹⁰

Turning to comparative fault and apportionment, excuses can figure in one of two ways. First, some courts, perhaps a majority, maintain that the question of whether a plaintiff can be found at all at fault for her own injury—unlike the question of whether the defendant exercised reasonable care—is at least sometimes to be judged by a less stringently objective standard. For example, a plaintiff with a mental disability that renders her less capable of caring for her own safety might be judged by the standard of persons with comparable disabilities, rather than the standard of a person without any such disability.⁹¹ The greater subjectivity of the standard for determining victim fault would seem, in principle, to leave room for excuses, though it is difficult to gauge the extent to which excuses actually do figure in such determinations.

Second, and perhaps more importantly, excuses can play a role in the apportionment of liability among multiple responsible parties. Thus, the Third Torts Restatement, which rejects the application of a less objective standard for determining victim fault, does so in part on the ground that subjective considerations can be taken into account by factfinders when they apportion fault among plaintiff and defendant.⁹² As specified in Section 8 of the Restatement's Apportionment provisions, the comparative fault inquiry invites an assessment of the "nature" of each at-fault actor's conduct that is of sufficient breadth to at least sometimes permit consideration of excuses.

For example, suppose that an elevator manufacturer's carelessness causes an elevator car to become stuck before it levels off at the floor of a commercial building.⁹³ The plaintiff, trapped inside, communicates by phone with the building's security guard, who reassures her that he will be able to secure her release in about an hour. Nonetheless, the plaintiff becomes claustrophobic and panics, pries open the elevator doors, and is injured attempting to pull herself up to the nearest floor. Even if it would be appropriate to assign some fault to the plaintiff in her negligence suit against the manufacturer, a judge or jury probably would be entitled to take into account the stress under which she acted as a reason to assign her a smaller percentage of responsibility than it would otherwise. Similarly, juries faced with apportioning liability among multiple tortfeasors responsible for a single injury

⁹⁰ This is *not* to say that excuses, by their nature, mitigate only punishment as opposed to other forms of accountability. *See infra* text accompanying notes 97-**Error! Bookmark not defined.** Rather, it is to say that excuses are particularly relevant when accountability takes the form of punishment.

⁹¹ Anita Bernstein, *The Communities that Make Standards of Care Possible*, 77 CHI-KENT L. REV. 735, 750-53 (2002) (focusing on the differing treatment of mental disabilities in determining plaintiffs' and defendants' fault); Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 472-80 (2002) (commenting on Bernstein).

⁹² *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3, cmt. a (2000).

⁹³ This hypothetical is based on *Phillips v. Fujitec America, Inc.*, 3 A.3d 324 (D.C. Ct. App. 2010) (affirming summary judgment for the defendant on grounds of contributory negligence).

might assign less fault to a tortfeasor who can claim a plausible excuse for its wrongdoing.⁹⁴

As with punitive damages, the availability of excuses in this domain does not seem particularly threatening to the core doctrinal claim of this Article. Insofar as tort law allows victims to make excuses for actions contributing to their own injuries, it is not offering leniency in the terms on which they are held accountable *to others* for having wrongfully injured those others. Rather, they are allowing excuses to figure in the assessment of how the victim's responsibility to look after herself counts against her ability to hold another accountable to her for having wrongfully injured her. Likewise, allocations of fault among co-tortfeasors are not concerned with reducing the extent to which each is accountable to the victim, but rather to address the question of how liability should be shared as between or among them. As the common-law rule of joint and several liability for indivisible harms attests, to say that a careless actor with a good excuse for his carelessness should be deemed 35% at fault for a plaintiff's injury, whereas another actor who was similarly careless but without an excuse should be deemed 65% at fault, is not to conclude that the 'excused' actor is entitled to leniency.⁹⁵ It is instead to acknowledge that there are others who happen to bear greater responsibility for the wrongful injuring of the plaintiff and who therefore should in principle be asked to bear more of the damages. To say the same thing, the actor who can point to plausible grounds for an excuse stands to pay less in damages not because his mistreatment of the victim should be judged less severely, but merely because he has the good fortune of being one of two actors who each wrongfully caused the victim's injury.

III. Explaining the Inexcusability of Torts

In this Part, I briefly consider some unsatisfactory attempts to account for tort law's indifference to excuses, then sketch what I take to be a better explanation.

A. *Excuses and Conduct Guidance*

Meir Dan-Cohen famously suggested that criminal-law excuses such as duress contain legal directives that are addressed in the first instance to officials (primarily judges), not citizens.⁹⁶ Arthur Ripstein subsequently invoked Dan-Cohen's

⁹⁴ Excuses are perhaps similarly applicable to apportionment issues arising from torts other than negligence. Thus, although no U.S. court recognizes "provocation" by the victim as a complete defense to a claim of battery, some will permit a jury to reduce a battery victim's damages on the ground that the victim provoked the battery. *See* Nadel, *supra* note 36, at §4. These cases in effect allow juries to deem a provoked battery partially excused—that is, as a situation in which the defendant is less culpable for the plaintiff's injury, such that the plaintiff should recover less than he would had the plaintiff borne no responsibility for the attack.

⁹⁵ *Ravo v. Rogatnick*, 514 N.E.2d 1104, 1108-09 (N.Y. 1987) (emphasizing that rules of contribution and indemnification aim to achieve fairness as between or among defendants rather than as between a defendant and plaintiff). The idea that joint and several liability is 'unfair' to a co-tortfeasor who is made to pay in excess of his proportionate fault is but another manifestation of the same failure to appreciate the distinctiveness of tort notions of responsibility that renders puzzling tort law's failure to recognize excuses.

⁹⁶ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 632-34 (1984); *see also* Berman, *supra* note 32, at 38

suggestion as part of an effort to explain the distinctiveness of criminal law from tort law.⁹⁷ An excuse in criminal law sets a limit on the state's authority to use force against a wrongdoer as punishment for having committed a wrong. The state plays no comparable role in tort law. Ergo, tort law has no place for excuses.

It strikes me as erroneous to suppose that excuses such as duress and provocation “speak to the state.”⁹⁸ On their face, they are addressed to citizens. After all, they are contained in criminal codes, not merely in sentencing manuals.⁹⁹ Taking a step back from the criminal context, it is obvious that excuses are relevant to myriad quotidian interactions that have no prospect of garnering the attention of government officials. One can sometimes offer a valid excuse for being late to meet a friend for lunch. Clearly, then, excuses are capable of ‘speaking to the citizenry’ and not the state. What reason is there to suppose that excuses differ so dramatically in the legal domain?

To be sure, excuse norms have distinctive characteristics. In criminal law and elsewhere they probably do not generate duties owed to anyone in particular. Of itself, a failure to demonstrate resilience in the face of duress or a provocation may not constitute a breach of a duty owed to a particular person or persons. Even so, excuses such as duress identify circumstances in which a person is expected to resist certain pressures to act wrongfully. If one fails to resist in such circumstances, one falls short of a standard of how one ought to behave, and is subject to legitimate criticism for having fallen short.¹⁰⁰

Likewise, it may be that excuses tend to guide conduct indirectly, by specifying situations in which an actor will not be able to mitigate or avoid responsibility for her actions. But indirect guidance is still guidance. No less than the “objective” fault standard in negligence—which tells us, among other things, that liability cannot be avoided simply by doing one’s best to be careful—criminal law’s nominate excuses guide conduct in part by specifying various circumstances that will *not* excuse.

Finally, excuses guide conduct by setting norms concerning appropriate responses to misconduct. A directive that enjoins each of us to refrain from intentionally striking another speaks directly to the conduct in question. A directive that defines what will suffice to excuse an intentional striking of another speaks as much to the victim and third-parties—it indicates when others should or should not

(arguing that the distinction between justifications and excuses just is that excuses are decision rules whereas justifications are conduct rules).

⁹⁷ RIPSTEIN, *supra* note 20, at 138-39; *id.* at 164 (“In the legal context, excuses differ from justifications in that a justification shows an act to be rightful, whereas an excuse concedes the act was wrongful, *but denies that the agent can be punished.*”) (emphasis added). Ripstein does not specifically frame his analysis as an account of why excuses are absent from tort law, but it seems fair to infer such an account from his invocation of Dan-Cohen’s argument as part of an effort to explicate core differences between crime and tort.

⁹⁸ *Id.* at 139.

⁹⁹ Some excuses relevant only to sentencing might be best understood as decision rules, though not every such excuse should be. A judicial decision to grant a lighter sentence based on the defendant’s having been under the sway of a powerful drug addiction still invokes norms of how one is expected to behave under such conditions.

¹⁰⁰ It is perhaps helpful to contrast legally recognized excuses with the so-called ‘duty to mitigate’ damages. Whereas the former set norms of primary conduct, the latter sets a condition that must be satisfied in order for one to have a legitimate claim to a certain level of compensation.

show lenience toward the wrongdoer. As John Dewey, Peter Strawson, and Stephen Darwall have in different ways emphasized, there is nothing odd about norms of conduct being articulated through an account that focuses on responses to wrongdoing.¹⁰¹ Indeed, each has insisted that cognizance of legitimate responses to wrongdoing is central to the idea of holding persons responsible for their wrongs.¹⁰²

B. Excuses and Indemnification

Another flawed explanation for tort law's lack of excuses also fastens on the difference between tort compensation and criminal punishment. Tort suits typically result in liability, whereas criminal prosecutions typically result in punishment. This difference, the argument proceeds, helps explain the absence of excuses in tort, as the example of duress demonstrates.

Suppose Alex steals Matthew's car only because Julie was holding a gun to Alex's head. It is tolerable for tort law to allow Matthew to recover damages from Alex—withstanding the unbearable pressure that Alex was under when he converted Matthew's car—because Alex can in principle seek indemnification from Julie, in which case responsibility and liability will ultimately lie where they ought to. By contrast, because there is no possibility of indemnification with respect to criminal punishment, criminal law recognizes duress as an excuse. A version of the same point might be made in connection with persons who carry insurance to cover liabilities arising out of their careless acts. A driver who, in response to highly stressful conditions, understandably drives carelessly is not provided an excuse because the driver must be found to have committed negligence in order for the insurer's duty to indemnify to kick in.

The problem with this line of reasoning is obvious. Many excuses have nothing to do with pressures or obstacles created by third parties or, more generally, with the possibility of indemnification. In a case of trespass to land under conditions of necessity, there is no would-be indemnitor waiting in the wings. The same is true for acts of carelessness committed in highly stressful situations that are not covered by a liability insurance policy. Yet in neither case does tort law permit excuses. The trespasser and the negligent actor each is being held responsible in his own right, for what he has done to the plaintiff, not because he is available to serve as a pass-through.

C. Dissolving the Puzzle

As noted in the Introduction, one can try to side-step the problem of tort law's insensitivity to excuses by denying that tort law really has anything to do with

¹⁰¹ JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 217 (1924) ("Liability is the beginning of responsibility. We are held accountable by others for the consequences of our actions."); STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT AND ACCOUNTABILITY* 3-10 (2006) (discussing the centrality to morality of the idea that other persons have authority to make demands on how one conducts oneself); P.F. Strawson, *Freedom and Resentment*, in *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 1, 6-7 (Routledge 2008) (1962) (discussing the centrality of "reactive attitudes" to notions of moral responsibility).

¹⁰² A criminal code that actually treated excuses as decision rules might also be morally suspect for withholding from citizens critical information as to their prospects for punishment. Dan-Cohen, *supra* note 96, at 665-77 (noting the potential illegitimacy of the selective transmission of legal rules). Thanks to Don Herzog for emphasizing this concern.

accountability for wrongs. Indeed, a person so inclined could argue that, by emphasizing the ways in which tort law is indifferent to excuses, I have actually vindicated this maneuver. After all, if one were looking for doctrinal evidence that tort law is not about wrongs in any robust sense, its lack of excuses would seem to fit the bill. That tort liability attaches even to those who act under duress, or out of necessity, or in response to pressures that would lead persons of ordinary resilience to act carelessly, seems to demonstrate that it cannot be law that is concerned with wrongdoing, and must instead be aiming to accomplish something different.

Nor is this an objection that needs to be imagined. Richard Posner long ago argued that tort law cannot be understood to be a law of wrongs and responsibility, except in the most attenuated sense. In support of this claim, he cited the insensitivity of negligence law to claims of incapacity and excuses.¹⁰³ Modern tort law is primarily about negligence, he reasoned, and negligence does not recognize excuses, which should tell us that legal fault is an altogether different beast from moral fault. Further, it helps us to see that tort law is a scheme for incentivizing actors to take cost-efficient precautions against causing harm.

Theorists who aim to link tort law to notions of fairness sometimes make a similar move. Jules Coleman and Stephen Perry, for example, has each suggested that tort law is best understood as implementing a principle of corrective justice according to which losses are to be transferred from those who, in fairness, shouldn't have to bear them to those who should.¹⁰⁴ Here again the distinctiveness of legal fault—and in particular its insensitivity to excuses—could be trotted out as a reason to favor an understanding of tort law according to which it aims to do something other than holding actors responsible for their wrongs. According to this kind of account, there is no mystery why an actor with a good excuse is nonetheless held fully liable for the consequences of his negligence. As between an innocent victim and a wrongful injurer, fairness calls for the loss to be borne by the injurer, even an injurer who has a good excuse.

For reasons discussed below, efforts to explain why torts are not 'really' wrongs are unmotivated. Regardless, they fail to make sense of tort doctrine. The interpretive challenges faced by efficient-deterrence theories having been well-documented.¹⁰⁵ Benjamin Zipursky and I have elsewhere pointed out comparable problems faced by loss-shifting theories, including their inability to account for torts that do not require losses, and their downplaying of the role that agency plays in

¹⁰³ Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 31-32 (1970) (noting ways in which the objective standard of fault departs from notions of fault found in everyday morality).

¹⁰⁴ See, e.g., COLEMAN, *supra* note 34, at 222-24, 314-18, 330-32 (distinguishing tort from crime, and arguing that tort law is concerned with responsibility for losses); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 497-500 (1992) (arguing that the objectivity of the fault standard is consistent with its serving as a criterion for distributing a loss among all persons outcome-responsible for the loss).

¹⁰⁵ See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 13-24 & n. 7 (2001) (critiquing efforts to explain tort law's structure and basic features as a scheme of efficient deterrence and citing other, related critiques by Ernest Weinrib and Benjamin Zipursky); RONALD DWORKIN, *LAW'S EMPIRE* 23-29, 276-312 (1986) (critiquing positive economic theories of common law and tort law).

determining liability.¹⁰⁶ In sum, these efforts to dissolve the puzzle of tort law's inattention to excuses come at the cost of abandoning the aspiration for a compelling overall account of tort law's main features.

D. Excuses and Punishment

One might suppose that excuses are not to be found in tort because excuses are uniquely relevant to particular forms of accountability for wrongdoing such as blame and punishment. Since—the argument would go—tort liability is not predicated on blame and is not punishment, it is no surprise that tort law fails to recognize excuses.

Just below, I will offer a variant of this argument. Before doing so, however, I need to explain why this particular iteration of it is too crude. As a conceptual matter, there is nothing unique about blame or punishment suggesting that excuses are relevant only to these forms of accountability. Consider, again, the role of excuses in everyday life. Often they are invoked to ward off complaints or criticisms, or to seek forgiveness, rather than as grounds for leniency in punishment. Indeed, they are routinely pleaded in connection with minor wrongs—*e.g.*, arriving late for an appointment—that provide no grounds whatsoever for punishment. If excuses can defuse a criticism or complaint about humdrum failings, it is difficult to see why, in law, they can only operate to limit punishment. Nothing inherent in the idea of an excuse prevents the law from recognizing excuses with respect to liability.

As noted earlier,¹⁰⁷ it may well be the case that excuses are particularly salient when accountability takes the form of punishment. Even so, this would not explain why excuses have *no* role in tort. The same problem inheres in suggestions that excuses apply only with respect to the sort of culpable wrongs that merit retribution or vengeance. Excuses pertain to accountability for wrongs generally, not just the particular form of accountability that goes under the heading “punishment.” The absence of excuses from tort law thus cannot be explained on the ground that excuses are, by their nature, irrelevant to accountability when it takes the form of liability.

E. The Distinctiveness of Tort

1. *Wrongs and Recourse.* As I noted at the outset, tort law directs us to refrain from attacking others even when we are provoked or under duress. It also requires us to refrain from trespassing on or converting another's property even in a situation of necessity. And it insists that we be careful even when we face pressures that would induce persons of ordinary skill and resilience to be careless. Legal requirements that are this demanding—some scholars seem to suppose—cannot possibly be requirements that define *wrongs*, except perhaps in the vacuous sense of defining conduct that, when undertaken, leaves the actor vulnerable to adverse legal consequences. Yet this last supposition is erroneous.¹⁰⁸

¹⁰⁶ John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 17, 29-35 (John Oberdiek, ed. 2014); John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEXAS L. REV. 917, 953-71 (2010).

¹⁰⁷ See *supra* note 90 and accompanying text.

¹⁰⁸ Adherence to the fallacies described below provides perhaps the most common route to the conclusion that the puzzle of tort law's lack of excuses should be dissolved rather than solved. However, it is not the only route. For example, Coleman has been careful to avoid the

The error in the supposition is its insistence on an unjustifiably rigid or narrow conception of what can count as a wrong. The ideas of committing a wrong, and being held responsible for a wrong, can vary with context without collapsing into vacuity. It is a fallacy—call it the *moralistic fallacy*—to suppose that the essence of wrongdoing is a strong form of culpability or blameworthiness.¹⁰⁹ To fall prey to this fallacy is to treat all wrongdoing as a species of sin; as a transgression that leaves a stain on the wrongdoer’s soul and warrants strong condemnation. Similarly, it is a fallacy—call it the *ought-implies-can fallacy*—to suppose that there is a unitary principle that forbids us from identifying conduct as “wrongful” whenever the putative wrongdoer lacks a certain degree of control over whether her conduct will amount to the commission of a wrong.

Concepts of moral and legal wrongdoing exist along a spectrum. To label conduct as “wrongful” for purposes of criminal law means one thing. To label conduct as “wrongful” for purposes of tort law means another. Criminal wrongdoing comes with certain capacity-and-control conditions. Tortious wrongdoing comes with other, less demanding conditions.¹¹⁰ To commit a criminal wrong warrants a certain kind of response. To commit a tortious wrong warrants a different kind of response. This is why, in the end, it is perfectly plausible for tort law to decline to recognize excuses, even though criminal law does.

To be clear, my claim is *not* that there is a complete conceptual misfit between excuses and tort liability: I criticize that claim above. Still, the instinct to draw some distinctions among crimes, torts, and other kinds of wrongs is sound. The trick is to give it a more satisfactory expression. There is nothing about the nature of excuses that would render them an unintelligible feature of tort law. Yet, given the distinctive nature of tortious wrongdoing, courts have good reason not to recognize excuses in tort.

The distinctiveness of tortious wrongdoing starts with the structure of tort duties. The duties of conduct identified by the law through its specification of particular torts are duties of non-injury, rather than duties of non-injuriousness.¹¹¹ One cannot breach a tort duty until one has injured someone. For example, the wrong of negligence, as defined by tort law, is not committed by acting carelessly. It is committed by injuring someone through careless conduct. This is why there can be inchoate crimes but not inchoate torts.¹¹² Until there is a victim, there is no tort.

two fallacies described below, and indeed has helped to expose them. Yet he might also argue that the absence of excuses in tort can be explained on the ground that tort law is, in the end, best understood as a law for the fair allocation of losses, rather than law that stands ready to hold wrongdoers responsible to their victims. *See supra* note 99 and accompanying text.

¹⁰⁹ I assume for present purposes that blameworthy acts are particularly culpable. For a broader and less freighted account of what it means to blame, see T.M. SCANLON, *MORAL DIMENSIONS* 122-138 (2008) (arguing that for X to blame Y is for X to regard an action of Y’s as demonstrating an attitude or disposition toward X that is incompatible with the terms of their relationship, and, on that basis, for X to revise negatively his attitude toward Y).

¹¹⁰ John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1143-63 (2007).

¹¹¹ Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 219 (G. Postema, ed. 2001).

¹¹² John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-41 (2002).

While different courts have held different views of what can count as an injury, and some have pushed the idea of injury quite far,¹¹³ they have rarely if ever suggested that there is such a thing as a victimless tort.

In fact, tort liability requires more than a wrongdoer, a wrong, and a victim. Tort law further requires a wrong *to the victim*. Conduct that is merely anti-social, or wrongful toward someone other than the person injured, is not tortious. As Benjamin Zipursky first demonstrated, all torts—whether trespass, fraud, defamation and negligence—have this “substantive standing” requirement.¹¹⁴ One who is not herself trespassed against, defrauded, defamed, or injured by carelessness as to her has no tort claim, even if the defendant has acted wrongfully toward others and caused injury to the victim in an entirely foreseeable way.

Relatedly, tort law assigns a particular role to the state. Unlike in criminal law, the government does not prosecute on behalf of the public. Rather, it stands ready to assist the victim in the pursuit of her claim. In criminal law, the case caption reads “People (or Government) v. Defendant.” In tort, it reads “Victim (or Victim’s representative) v. Defendant.” It is no coincidence that torts are wrongs with victims, and that tort suits are brought by victims. Tort law is largely about victims’ rights—the right of potential victims not to be injured, and the right of actual victims to respond to having been injured.

Finally, the aim of tort suits is to enable a wrongfully injured victim to obtain a form of satisfaction as against the wrongdoer. This is why the end result of a tort suit, typically, is an award of compensatory damages or injunctive relief. Tort law empowers victims to demand something tangible from tortfeasors by way of redress for the injurious wrong done to them. This is why the measure of tort compensation is keyed to the victim’s losses, and in turn why many defendants’ complaints of being made to pay compensation ‘out of proportion’ to the gravity of their wrong fall on deaf ears. Here too tort law’s attention to the interests of victims relative to the interests of wrongdoers is evident.

In sum, although they both concern wrongs, criminal law is one kind of system of accountability for wrongs and tort law is another. Because criminal prosecutions are brought by a powerful state that operates the system through which accountability occurs, and because the point of such prosecutions is to inflict punishment on behalf of the public, criminal law builds in various protections for defendants. These include heightened evidentiary burdens for the prosecution, greater efforts to ensure adequate notice to potential defendants, and a general norm of construing legal ambiguities against the state. They also include the recognition of excuses both with respect to guilt and punishment.¹¹⁵

¹¹³ For example, some courts have deemed a reduction of a medical patient’s slim chances for survival to constitute an injury to the patient. *See, e.g., Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008).

¹¹⁴ Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15-40 (1998).

¹¹⁵ Again, the point is not that excuses are to be understood, at a conceptual level, as considerations bearing exclusively on leniency in punishment. Rather, it is that excuses are appropriately invoked within a system, such as criminal law, that defines duties owed to society in general, and that entrusts public authorities to enforce and punish violations of those duties.

In tort law, by contrast, the interests of the putative injurer and the putative victim are delineated in a more evenhanded way, and it is the reciprocally situated putative victim who proceeds against the putative injurer, not the state. Once the rights and duties of each have been delineated through the definition of particular torts, a victim who is able to establish that her right has been violated by the defendant is *ipso facto* able to establish that the defendant breached a duty to her, i.e., wronged her. And because tort law is in the business of empowering those who are wronged in this sense, rather than punishing those who commit crimes, the demands placed on plaintiffs are, on the whole, less onerous than those placed on criminal prosecutors.¹¹⁶ Likewise, there is less emphasis on the wrongdoer's culpability and control: liability can be keyed to outcomes even granted that tortfeasors lack a substantial degree of control over those outcomes.¹¹⁷ And conduct can count as tortious that is not criminal nor blameworthy in a strong sense. Just as tort law is entitled to require clumsy persons to live up to the standard of a person capable of ordinary prudence, it is entitled to define wrongs in a manner that is inattentive to excuses. In response to a wrongful injurer's proffered excuse, a tort victim is, in effect, authorized to say: "I really don't want to hear about it. I understand that you might have a good explanation of why you did what you did. But that doesn't matter to me. You still wrongfully injured me, and I am now entitled to hold you to account." The innocent victim of an attack perpetrated by an attacker acting under duress has still been victimized. So too has the victim of a trespass undertaken by necessity, or an act of negligence committed under circumstances in which one could not have expected even a resilient person to act carefully.

This last observation points to a related dimension of tort that further explains its indifference to excuses. Excuses in criminal law allow defendants to make arguments against liability that are directed to a judge or jury. A criminal defendant's duress defense, for example, is an argument that asks a judge or a jury

¹¹⁶ Goldberg & Zipursky, *supra* note 110, at 1123, 1143-63. This is not to deny that many tort claimants face formidable barriers to prevailing as a result of bearing the burden of proving that a tort has been committed. Indeed, one might cite the difficulty of prevailing as a reason that favors tort law's reliance on standards of conduct that are in certain respects relatively demanding.

¹¹⁷ This is why the now-familiar "moral luck" objection to tort law is misguided. Jeremy Waldron and Christopher Schroeder, among others, have condemned tort as morally arbitrary because of the role it gives to causal fortuities. Driver A drives carelessly but, through sheer good luck, hits no one; Driver B drives identically and, through sheer bad luck, hits someone. Liability, they insist, cannot fairly be imposed only on B, for B and A have committed the same wrong—careless driving. *Id.* at 1125-26 (quoting from Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 387-88 (David G. Owen ed., 1995); Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra*, at 347, 361). This criticism simply misses the point. Tort law is not a matter of the state imposing liability on anti-social conduct, nor is it matter of seeing to it that wrongdoers get their just deserts, whatever those might be. It is law that empowers victims to respond to having been wrongfully injured. For *this* sort of scheme to insist on the presence of a victim is not arbitrary. It is the very point of the enterprise. Goldberg & Zipursky, *supra* note 110, at 1132-43. Moreover, there is plenty of reason to think that the enterprise is one that both embodies values central to Anglo-American law (individual rights, status equality, etc.) and that stands to deliver various goods (norm-reinforcement, compensation, deterrence, etc.).

to relieve her of liability because of the pressures she faced at the time she committed the crime. By not recognizing excuses, tort law transfers this power to the victim. In tort, pleas of excuse overwhelmingly can only be directed to the victim herself.¹¹⁸ In other words, tort law provides a framework of accountability for wrongs that grants to victims of those wrongs—rather than chief executives, prosecutors, judges, or jurors—the power to excuse. It is no coincidence that the same legal system that declines to recognize excuses in tort law denies to the chief executive the power to intervene in tort and other litigation over private wrongs.¹¹⁹

2. *Redress for Wrongs, Not Compensation for Losses.* It would be understandable if one were to see in the foregoing analysis an endorsement of a conception of tort that gives priority to victims and victim compensation. After all, I have not only emphasized unforgiving aspects of tort duties, I have connected these features of tort duties to a notion of victim empowerment. And it is not a huge leap to move from a focus on victim empowerment to a focus on victim compensation, which in turn invites thoughts of workers' compensation schemes, or the fund set up by Congress to compensate certain victims of 9/11. In these tort-replacement schemes there is little or no attention to wrongdoing. The point is to get money to people who need or deserve it. Liability (if that is even the right word) is "strict," meaning that the payment of 'compensation' is divorced from notions of wrongdoing.

In fact, the foregoing analysis is not part of an effort to depict tort law as skewed toward victims, or as a compensation scheme that is indifferent to wrongdoing. Torts are wrongs. Until someone has acted in a manner proscribed by tort law—until someone has assaulted another, defamed another, invaded another's privacy, or injured them through carelessness, for example—there is no ground for liability. And, although compensation is the standard tort remedy, compensation, in this

¹¹⁸ There is some evidence suggesting that at least some tort plaintiffs are willing to be lenient or temperate toward tortfeasors whose wrongs are more understandable than others. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 284-85 (2001). With respect to the medical malpractice claims he studied, Baker found that most plaintiffs were content to accept a settlement at the limits of the physician's malpractice insurance, even when they might have been able to get more from a jury. Obviously there is a lot that goes into the dynamics of settlement, including the critical and potentially problematic role played by plaintiffs' lawyers in 'managing' client expectations. *Id.* at 283. But the outcomes Baker observed may in part have been a matter of plaintiff leniency—a recognition that, though medical mistakes are often wrongs, they are also often understandable wrongs. The important point is that, insofar as torts are understandable wrongs, they are not excused by operation of law. Rather, they are excusable by the victim.

¹¹⁹ Power of the President to Remit Fines Against Defaulting Jurors, 4 U.S. Op. Att'y Gen. 458, 460 (1845) (upholding the President's power to pardon a court-imposed fine on defaulting jurors, but noting that this power, like the English monarch's, is confined to penalties for offenses against the public, and does not extend to remedies for private wrongs); The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 491 (1831) (contrasting the President's power to control federal criminal prosecutions with his lack of power to intervene in civil proceedings); John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law of Redress for Wrongs*, 115 YALE L. J. 539-41, 543-44 (2005) (noting the British common law constitutionalist tradition of denying the monarch the power to pardon or forgive civil wrongs).

context, refers to the payment of money as “damages”—as a form of satisfaction or vindication, not as the paying out of a benefit.¹²⁰

The point, once again, is that tort law cogently deploys a distinctive and in some ways capacious conception of wrongdoing.¹²¹ Injuring another through carelessness that one could not have avoided sometimes will count as negligence. More dramatically, perhaps, injuring another through the sale of a product that happens to contain a dangerous defect, irrespective of whether the seller could have caught the defect, will sometimes count as a tort. Often liability imposed on these terms is described as “strict.” But this description trades on an ambiguity in the phrase “strict liability.” Many forms of so-called “strict” liability *are* wrongs-based.

If a defective product injures a user in the ordinary course, and the defect was present in the product at the time of sale, the seller has wrongfully injured the victim, and not merely in the vacuous sense of having done whatever the law requires for liability to attach. There is a genuine failure or ‘defect’ in the seller’s *conduct*, namely, the sale of a product containing a danger that it should not contain. This is something which, according to tort law, is not to be done. The sending into the world of a dangerously defective product is the kernel of wrongdoing within even strict forms of products liability.

Of course it is difficult if not impossible for a commercial seller to comply perfectly with the legal directive that prohibits the sale of a defective product. Luck has a significant role to play, and denials, justifications, and excuses are hard to come by. Thus, even a seller who can prove that it exercised extraordinary care to avoid selling a defective product can be deemed to have done wrong if it sells such a product and if that product injures someone in the ordinary course. But this is just to say that the directive contained within modern products liability law is a demanding directive, and that the wrong of injuring someone through the sale of a defective product is sometimes minimally culpable.

One can easily imagine a different form of strict products liability that is fully detached from wrongdoing. Suppose a person who, despite being careful, trips over a nondefective tennis ball and breaks his ankle. If products liability doctrine permitted this person to recover from the seller of the tennis ball simply on the ground that the ball played a role in his being injured, then liability would no longer be wrongs-based in any meaningful sense. From the get-go, however, advocates of strict products liability have insisted that it not extend this far, and instead that it be limited to products that are sold in a defective condition.¹²²

Tort law’s imposition of defect-based liability is of a piece with its reliance on an objective fault standard, its refusal to countenance necessity as a justification for trespass, and its indifference to excuses. Seeing the link among these doctrines can in turn shed some light on the longstanding obsession among torts scholars with the

¹²⁰ John C. P. Goldberg & Benjamin C. Zipursky, *Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin*, 61 DEPAUL L. REV. 487-90 (2012).

¹²¹ In other ways—for example, through its adoption of relatively narrow affirmative duties to take steps to protect others from injury—tort notions of wrongdoing are less capacious.

¹²² *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”).

question of negligence versus strict liability. Forty years ago, Morton Horwitz helped set off an academic firestorm by arguing that seventeenth- and eighteenth-century courts routinely imposed strict liability for accidentally caused harms, whereas nineteenth-century courts introduced fault-based liability as a means of limiting liability and “subsidizing” nascent industry.¹²³ His argument was incendiary in part because it connected to the then-prevalent view that *the* pressing policy question for modern tort law is the question of whether accidents should be governed by a rule of negligence or strict liability. My suggestion is that, notwithstanding all the attention it has received as a matter of history, doctrine, and theory, this supposedly stark dichotomy has been overblown, and that attention to the absence of excuses in tort can help us to see why.

In tort, the divide between strict liability and fault is subtle, not stark. It is subtle precisely because the tort notion of fault is demanding. Negligence law requires us to meet the standard of care of a person of ordinary prudence—a standard that makes few allowances for mitigating factors, and that has little if any room for excuses. Thus, when a repeat-player tort defendant, such as a product manufacturer, complains about the unfairness of being held ‘strictly’ liability, that complaint should be met with caution. The reason for caution is not, as Horwitz suggested, because there is a long common law tradition of imposing tort liability irrespective of wrongdoing. Rather, it is because there is a long tradition of imposing tort liability without regard to the sort of excuses that, in other settings, suffice to exculpate careless injurings and other wrongs.

F. Excuses, Mercy and Forgiveness

The provision to tort plaintiffs of the power to excuse naturally invites consideration of concepts such as compassion, mercy, and forgiveness. It may thus be illuminating to situate that power in relation to two influential accounts of those concepts.

Jeffrie Murphy has famously distinguished mercy from forgiveness on two grounds. Mercy, he argues, can be bestowed by a non-victim (e.g., a prosecutor or judge) whereas only victims have standing to forgive. Moreover, forgiveness involves the reshaping of one’s attitude toward a wrongdoer—the foregoing of warranted resentment—and is thus compatible with refusing to be merciful in terms of the consequences to be visited on the wrongdoer.¹²⁴

Relative to Murphy’s categories, a tort defendant’s offering of excuse-like considerations is a hybrid. It is a plea for leniency directed to the victim, who alone has standing to decide whether to heed the plea. In the respect, it is akin to Murphy’s notion of forgiveness. And yet the victim probably can heed such a plea

¹²³ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1960*, at 62-108 (1977).

¹²⁴ Jeffrie G. Murphy, *Forgiveness and Resentment*, in Jeffrie G. Murphy & Jean Hampton, *FORGIVENESS AND MERCY* 14, 21 (1998). Murphy elsewhere suggests that excuses *cannot* serve as a ground for forgiveness—the idea being that, when a wrong is excused, there is nothing to resent and hence nothing to forgive. *Id.* at 20. This strikes me as mistaken. Even a fully excused wrong is still a wrong, and as such something that is eligible to be forgiven. A victim of an attack made under duress, in my view, can cogently resent the attack and the attacker. (“Why me?,” she might fairly ask.) Tort law’s insensitivity to excuses suggests that there is room for leniency even with respect to wrongs committed under circumstances that render their commission entirely understandable.

without thereby abandoning her resentment, and in that respect resembles his notion of mercy.

Excuses likewise operate in the tort context on terms that cut across George Fletcher's distinction between mercy and compassion. Mercy, he argues, is granted by someone who holds power over another, and is based on an assessment that the other is of generally good character and therefore deserving of leniency.¹²⁵ According to Fletcher, mercy is given institutional expression in criminal law in the discretion that certain actors within the system can deploy to spare a criminal defendant or mitigate his punishment, such as a prosecutorial decision not to charge or an executive's pardon.¹²⁶ By contrast, he maintains that compassion is rooted in a recognition of shared human frailty, and responds to particular acts rather than to the character of the wrongdoer.¹²⁷ It counsels that we not be too quick to sit in judgment over an actor whose wrongful act is one that we, too, might have committed under the circumstances that the actor faced. Compassion (again, according to Fletcher) thus receives its expression in criminal law through the identification of particular excuses that do not depend on a decisionmaker's discretion and instead earn the defendant acquittal as a matter of right.¹²⁸

In a tort case, excuses bear some connection to mercy, as Fletcher uses that term. Tort law's failure to give excuses any formal recognition leaves the choice to excuse in the hands of the plaintiff, who, by prevailing on her claim, has secured a legal power over the tortfeasor. Yet I see no reason to suppose, as does Fletcher, that mercy of this sort can only be granted by reference to assessment of the tortfeasor's character, as opposed to her tortious conduct. (Perhaps the plaintiff knows nothing of the defendant's character yet still concludes that the defendant's tort was committed under circumstances that render it understandable.) Nor, *contra* Fletcher, must mercy of this sort be divorced from an egalitarian notion of shared human frailty, as opposed to the idea of a superior granting an indulgence to an inferior. Indeed, it might be just such an egalitarian notion that moves a tort plaintiff to show some leniency toward the defendant.

To summarize: tort law has basic features that hang together. It is not mere happenstance that torts are defined as injury-inclusive, relational wrongs, or that tort law empowers victims to respond to having been injuriously wronged, or that successful tort plaintiffs are ordinarily entitled to compensation keyed to their losses rather than to the wrongdoer's culpability. It is also not mere happenstance that wrongdoing in tort is defined in ways that are, in certain respects, relatively demanding. Tort law's general indifference to excuses is part and parcel of its being a law of injurious wrongs and victim redress. It would be an overstatement to assert that courts would be abandoning tort law were they to start to recognize certain excuses. But it would be accurate to say that their doing runs counter to its general orientation. At a minimum, tort law's inattention to excuses is entirely defensible.¹²⁹

¹²⁵ FLETCHER, *supra* note 14, §10.3.3, at 808.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Today, liability insurance can often help to ameliorate the more demanding aspects of tort law and, in doing so, bolsters its legitimacy. Other things being equal, a system that holds wrongdoers liable without regard to excuses is more palatable if injurers have the practical ability to protect themselves from incurring ruinous liability.

G. A Note on Excuses in Contract

It is beyond the scope of this Article to provide an in-depth analysis of the role of excuses in contract law. Nonetheless, it is important to at least gesture at some thoughts on that subject. After all, my account of the different treatment of excuses in criminal and tort law turns in large part on distinctions between public law and private law. It is because torts are relational wrongs—wrongs to particular persons—and because they generate private rights of action that excuses are out of place in tort. But of course contract law is private law too. Thus, if contract law were to recognize excuses, I would have some explaining to do as to why, given the many commonalities between contract and tort, tort law does not recognize excuses.

The most commonly identified candidates for excuses in contract law include mistake, impossibility, impracticability, and frustration of purpose. A defendant who invokes one of these doctrines could be characterized as conceding that he has committed a legal wrong by not performing as required under the contract, yet seeking to excuse the wrong by identifying unusual circumstances that render the breach understandable.

For present purposes it will suffice to say that this characterization is tendentious at a minimum, and probably incorrect. A fundamental norm of contract law is that agreements are to be kept.¹³⁰ The notion is one of liability in accordance with the terms of the agreement, irrespective of the difficulty of meeting those terms.¹³¹ The law's presumption is that, since contractual obligations ordinarily are negotiated and voluntarily assumed, qualifications to performance obligations can be built into the agreement. If one does not wish to guarantee performance, one can instead agree to make reasonable or best efforts to perform.¹³² Contracting parties are thus ordinarily not allowed to escape their obligations by pointing to some unexpected difficulty that renders performance more difficult, even if it is of a sort that renders their nonperformance understandable in the requisite sense.

And yet contract law occasionally does provide for just such an escape. However, when it does, it does *not* do so by recognizing excuses for breach. Instead it recognizes certain implicit conditions built into the parties' obligations. To put the point in the language of Part I, invocations of 'excuse' doctrines in contract are best understood as *denials* rather than genuine excuses.

For example, when a contracting party invokes impossibility or impracticability, she argues that the contract implicitly conditioned her performance on its not being rendered impossible or impracticable by certain subsequent events. Given this condition, there is no breach that needs to be excused—the nonperforming party never incurred a duty to perform under those circumstances.¹³³ Indicative of the fact that doctrines such as impossibility and impracticability concern qualifications to contractual duties rather than excuses for breaches of those duties is the fact that

¹³⁰ 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §9.1, at 558 (2d ed. 1998).

¹³¹ Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3017 (2007).

¹³² FARNSWORTH, *supra* note 130, §9.1, at 559.

¹³³ *Id.*, §9.6, at 604 (quoting UCC § 2-615 for the notion that a seller's failure to deliver is not a breach of contract when delivery has been made impracticable by the occurrence of a contingency, the nonoccurrence of which as a basic assumption on which the contract was made, and noting that the Second Contracts Restatement is in accord with the UCC on this point); *Bridgeman*, *supra* note 131, at 3035-36.

these doctrines set defaults that can be overridden (or expanded upon) by explicit contractual terms.¹³⁴ Likewise, there is no need to invoke excuses to explain the absence of liability for nonperformance of an agreement that reflects a fundamental misunderstanding—a non-meeting of the minds. In such a case, the parties simply failed to obligate themselves.¹³⁵

Admittedly, some courts and commentators have questioned whether doctrines such as impossibility and impracticability can fairly be characterized as conditions on contractual obligations, given that these conditions are typically implied rather than express. If it is courts that are imposing these limits on contractual duties, how can these be genuine contractual terms, as opposed to after-the-fact recognitions of excuses for non-performance? Yet, as Curtis Bridgeman has observed, the identification of implicit conditions in contracts by no means collapses into the recognition of after-the-fact exemptions:

even if parties never expressly addressed possible events [that render performance impossible or impracticable], the court is justified in ascribing intentions to the parties for such cases based on the relevant norms and practices of the community. Meanings are not a purely individual matter. Just as a party is not entitled to keep an intention private and then claim protection based on that intention later, so too the parties' mutual agreement will be interpreted in light of relevant customs, norms, and practices both of the parties and of the community.¹³⁶

A court charged with the task of interpreting a contract can fairly infer from its terms that the parties agreed to those terms in light of certain background assumptions as to what would remain constant over the life of the contract, even when those assumptions are not identified explicitly in the contract. When courts do so, they are not granting excuses. They are enforcing the agreement into which the parties entered.

Obviously this brief excursus cannot substitute for a full analysis of the role of excuses in contract law. It aims instead to forestall a facial objection to my analysis of tort law. As noted above, that objection runs as follows: if I am correct about the reasons for the absence of excuses in tort, one should not expect to find excuses in contract law, yet excuses can be found there. I have suggested a line of defense against this objection by pointing toward a plausible (and indeed mainstream) account of contract doctrine according to which the contract doctrines that appear to harbor excuses in fact do not.

Conclusion

In contrast to criminal law, tort law does not recognize excuses as a ground on which judge or jury might spare a defendant from liability or limit her liability. In this respect, as in several others, tort law sets demanding standards—standards that, on some occasions, ask more of us than we can be expected to deliver.

Some have suggested that the unforgiving aspects of tort law entail that it is a law of wrongs in name only. I have sought to explain why this inference is mistaken.

¹³⁴ FARNSWORTH, *supra* note 130, §9.6, at 604-05.

¹³⁵ RESTATEMENT (SECOND) OF CONTRACTS §20 (1981) (where neither party knows or has reason to know that the other attaches materially different meanings to their manifestations of agreement, no contract is formed).

¹³⁶ Bridgeman, *supra* note 131, at 3037.

The absence of formal excuses in tort does not demonstrate that torts somehow fail to count as wrongs. It demonstrates instead they are a certain kind of wrong—namely, violations of legal directives that specify ways in which we are required to conduct ourselves toward others so as to avoid injuring those others.¹³⁷ It is entirely cogent, not mere wordplay, to describe violations of these sorts of directives as “wrongs.” In this particular sense, torts really are inexcusable wrongs.

Understanding the sense in which torts are inexcusable helps us to appreciate further how some of tort law’s most notable features—the objective fault standard in negligence, the relative indifference throughout tort law toward problems of moral luck, and the linkage of wrongs to rights of action—hang together to form a coherent body of law. It can also teach us something about wrongs more generally, whether legal or moral. Simply put, it is a mistake to associate the idea of wrongs with vengeance, with punishment, and with fire and brimstone. A wrong, at its most basic, is simply a failure to heed a directive that specifies how one is obligated to conduct oneself in light of certain interests of others. To be sure, some wrongs are heinous and warrant outrage. But many are mundane and instead warrant responses ranging from expressions of disappointment to liability.

Oliver Wendell Holmes, Jr. was wrong about wrongs, and wrong about torts, when he linked the common law’s traditional focus on wrongdoing to primitive notions of vengeance and blame, and thereby dismissed the idea that modern tort law could be a law of wrongs, as opposed to law that distributes losses on terms consistent with basic principles of liberalism, as he understood them.¹³⁸ Contemporary commentators are likewise off-base in supposing that tort law is the worst of both worlds: a clumsy mechanism for deterring misconduct, and for compensating the injured, that relies on judgmental moralism in place of rational policymaking. Tort law is not a law of vengeance. Nor is it a regulatory mechanism. It specifies wrongs and provides private rights of action to victims, thereby enabling us to hold each other accountable for injuries that we wrongfully inflict on one another.

¹³⁷ In some instances, it requires us to conduct ourselves toward others so as to protect them from injury.

¹³⁸ OLIVER W. HOLMES, JR., *THE COMMON LAW* 3, 107-10 (Little Brown, 1923) (1881).